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Transnational personality rights violations through special forums in the torts sector and the role of the Court of Justice of the European Union

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Chris Okofor, PhD in European Union Law, Legal advisor, UK
Olson Pauchard, PhD in international private law. Attorney at Law, US

Abstract: This paper deals with disputes over transnational personality rights violations. Disputes involving infringements of intangible rights that are compatible with the traditional conflict rules in the torts sector are based on elements that constitute the tort. It also deals with torts that are noted on the Internet. Violations focused on the right to freedom of expression, criticism, defamation, etc. have a difficult impact on the balance of rights. The rules of private international law of the Union have a long history, in this regard. They are applicable to disputes and take into account problematic aspects that are always under discussion. Art. 7, n. 2 of the Regulation Bruxelles I-bis has been interpreted, through the Court of Justice of the European Union, as applicable law. Criticisms of application for jurisdictional titles and connecting factors are

often problematic for these rules to a framework that needs coordination. The localization of the cases of material conflict rules and the general application of the lex fori, as a reference to the legal system of competence, are inspired by methods of norms, which regulate international private aspects for violations of personality rights of a transnational nature in comparison with various other solutions. This is an alternative to the different coordination method, which verifies and changes the functional method for the protection of the interests involved.

Keywords: personality rights; European Union law; special forums; transnational torts; private international law of the Union; Regulation (EU) no. 1215/2012; Regulation (EU) no. 44/2001; CJEU; forum shopping; freedom of expression; defamation through the press; defamation through the internet; identity rights; damages actions; injunction actions; conflict rules; competent forums.

Art. 7, n. 2 of Regulation (EU) n. 1215/2012, special forum and CJEU

The jurisdiction of Art. 7, par. 2 of Regulation (EU) n. 1215/2012, i.e. Brussels I-bis addresses the treatment of jurisdictional issues on disputes relating to the violation of

personality rights of a transnational nature (Liakopoulos, 2018a).[1]

This regulation represents the recast of Regulation (EC) n. 44/2001, i.e. Brussels I, as implemented by the Brussels Convention of 1968, i.e. the communitarization for civil cooperation according to the spirit of the Treaty of Amsterdam (Liakopoulos, 2018b).[2] These instruments in temporal succession and according to the disputes relating to violations of personality rights have not been under discussion but fall within civil and commercial matters (Mankowski, 2016).

The disputes in matters of torts and delicts[3] as well as Regulation No. 1215/2012 confirmed Regulation No. 44/2001, which provided for the special jurisdiction based on Art. 7, adding the domicile of the defendant, according to Art. 4.[4]

1Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJ L 351, 20.12.2012, pp. 1-32.

2Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJ L 12, 16.1.2001, pp. 1-23.

3See recital no. 16 of the Brussels I-bis Regulation which states: "(...) disputes concerning non-contractual obligations arising from violations of privacy and personality rights, including defamation (...)". Art. 7, no. 2 states that the owner of the personality rights has transferred to third parties the contract with the related economic exploitation for his rights. The disputes arise from the contract and are not part of the scope of application for the forum of the tort but in the relevant contractual forum according to art. 7 no. 1 Brussels I-bis. See also in argument: CJEU, 13 March 2014, C-548/12, Brogsitter, ECLI:EU:C:2014:148, published in the electronic Reports of the cases, parr. 23-27. 24 November 2020, C-59/19, Wikingerhof, ECLI:EU:C:2020:950, published in the electronic reports of the cases, parr. 19-38.

4See note: "Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters", in OJ EC C 59 of 5.3.1979, known as the "Jenard report" which refers to relative special jurisdictions that are introduced in matters that are directed to the judicial authority that is competent in its own territory without taking into account the rules relating to territorial jurisdiction for individual

Art. 7, par. 2 of the Brussels Regulation I-bis provides that a person domiciled in a Member State. who is sued in another state in relation to:

"(...) matters relating to tort, delict or otherwise, shall be subject to the jurisdiction of the courts of the place where the harmful event occurred or may occur (...)."[5]

Furthermore, it is also subject of the jurisprudence from the Court of Justice of the European Union (CJEU).

The CJEU has often affirmed the matter of tort autonomously reconstructing compliance with national legal systems in a complementary way respecting the contractual matter based on Art. 7, n. 1, as an action, which has ascertained the liability of the defendant within the contractual sphere.[6] This definition is based on requirements within an action that leads back to the subject matter of its own torts. It imposes the direct claim and establishes the liability of the defendant as a positive

member states. The special jurisdictions are limited to indicating the state in which the judicial authority has its jurisdiction but without establishing directly the place where the judge who has jurisdiction sits. CJEU, 3 May 2007, C-386/05, Color Drack, ECLI:EU:C:2007:262, I-03699, par. 30. See also recital no. 12 of regulation no. 44/2001 which highlights the alternative forums that find their reasoning to a precise connection that they present and that respect the dispute based on a good administration of justice. See also recital no. 12 of regulation no. 1215/2012 which highlights the discipline of special forums, as well as the need for certainty of law and predictability for the competent judges when the defendant constitutes a jurisdictional authority that is not reasonably foreseeable.

5CJEU, 16 July 2020, C- 73/19, Movic BV and others, ECLI:EU:C:2020:568, published in the electronic reports of the cases, par. 32.

6CJEU, 27 September 1988, C-189/87, Kalfelis, ECLI:EU:C:1988:459, I-05565, par. 17; 1st October 2002, C-167/00, Henkel, ECLI:EU:C:2002:555, I-08111, par. 36. 18 July 2013, C-147/12, ÖFAB, ECLI:EU:C:2013:490, published in the electronic reports of the cases, par. 32. 28 January 2015, C-375/13, Kolassa, ECLI:EU:C:2015:37, published in the electronic reports of the cases, par. 44. 12 September 2018, C-304/17, Löber, ECLI:EU:C:2018:701, published in the electronic reports of the cases, par. 19. 24 November 2020, C-59/19, Wikingerhof, op. cit., par. 23.

requirement and as the subject matter of the claim while asking for the liability, that is invoked in contractual matters as a negative requirement and as a basis of a claim.[7]

The CJEU stated that the claim invokes the defendant's liability for damages and consequently asks the court to ascertain the causal link for damages.[8]

The CJEU clarified and verified, that the claim does not create involuntary obligations assumed by the defendant itself arising from the breach of a duty of the law.[9] The range of action falls within the scope of application of Art. 7, no. 2 Brussels I-bis[10] even if the provision is of a residual nature. It respects and provides for the contractual forum as it has observed, through the actions falling under Art. 7, no. 1 and in Art. 7, no. 2 for unjust enrichment.[11]

7Conclusions of the Advocate General Jääskinen, presented on 19 April 2012, in case C-133/11, Folien Fischer, ECLI:EU:C:2012:226, published in the electronic reports of the cases, par. 45. Conclusions of the Advocate General Saugmandsgaard Øe, presented on 10 September 2020, in case C-59/19, Wikingerhof GmbH & Co KG v. ooking.com BV, ECLI:EU:C:2020:688, published in the electronic reports of the cases, parr. 43ss.

8CJEU, 30 November 1976, 21/76, Bier, ECLI:EU:C:1976:166, I-01735, par. 16. 18 July 2013, C-147/12, ÖFAB, op. cit., par. 34.

9CJEU, 17 September 2002, C-334/00, Tacconi, ECLI:EU:C:2002:499, I-07357, parr. 23-27. 18 July 2013, C-147/12, ÖFAB, op. cit., parr. 32-33.

10CJEU, 17 September 2002, C-334/00, Tacconi, op. cit., par. 27.

11CJEU, Conclusions of the Advocate General Wahl, presented on 7 April 2016, in case C-102/15, Gazdasági Versenyhivatal v. Siemens Aktiengesellschaft Österreich, ECLI:EU:C:2016:225, published in the electronic reports of the cases, parr. 55-75. 9 December 2021, C-242/20, RVATSKE ŠUME d.o.o., Zagreb v. BP Europa SE, ECLI:EU:C:2021:985, published in the electronic reports of the cases, parr. 55-56: "(...) Art. 5 n. 3 of Regulation n. 44/2001, since it is based on an obligation which does not originate from a harmful event and does not aim to obtain the ascertainment of the defendant's liability (...)".

The application of the provision dwells and designates the place where the harmful event has occurred and occurs. The wording is devoid of a definition by the authors of the Brussels Convention of 1968 and by various interpretations.[12]

In the Bier case the CJEU seeked to clarify Art. 5, n. 3 of the Brussels Convention, which is part of Art. 7, n. 2 of the Regulation Brussels I-bis, i.e. the "place where the harmful event occurred" understood also as "place where the damage occurred" and "place of the event generating such damage", thus attributing to the choice of the plaintiff in the case they coincided.

The CJEU states that this principle has remained the same for over forty years leaving unresolved the event that created its damage (Carrascosa González, 2016-2017). The hypotheses of unlawful act identify a plurality of prodromal acts, as well as a plurality of harmful acts requested for the purposes of application of this principle belonging to its own judgment.

The definition of the place of the event created by the damage suggests to take into consideration actions according to the law performed, i.e. the lex causae. Such actions are considered as preparatory acts of the unlawful act. Therefore, the acts and intentions of the author of the unlawful act are not considered as preparatory acts but as executive acts (Von Kubis, 1999).

12See Jernard Report of 1968: http://www.dutchcivillaw.com/legislation/jenard011.htm Accessed on 10.09.2025.

The only actions that have integrated the event, as a generator of the damage, are the original ones, which put an end to the events of the damage and the responsibility of the author (Kaye, 1987). The interpretation and definition under investigation is also based on the DFDS Torline case.[13] In it it was stated that:

"(...) a fact can be considered an event originating the damage pursuant to Art. 5 n. 3 of the then current Brussels Convention, it is not necessary that the damage has arisen from it "certainly or probably", but it is sufficient that it represents a "necessary presupposition" of the same (...)".

In the Kainz case[14] it was specified that the actions in the matter of liability for a defective product situate the event generating the damage. This is based on Art. 5, n. 3 of the Regulation n. 44/2001, as a product that respects the dispute and facilitates the collection of evidence. In other words, it is an organization of the process, which guarantees the correct administration of justice and responds to the need for predictability of the forum by its producer. This is how the CJEU specified that the event generating the damage to an original fact has attributed the relative relevance to the chain of events, which led to the relative illicit act, i.e. the manufacturing of the product for others, that is, the distribution and sale of the product.

The Bier case has highlighted and manifested the damage, while other secondary elements outlined have arrived through the

13 CJEU, 5 February 2004, C-18/02, DFDS Torline, ECLI:EU:C:2004:74, I-01417, par. 29ss.

14 CJEU, 16 January 2014, C-45/13, Kainz, ECLI:EU:C:2014:7, published in the electronic Reports of the cases.

Dumez[15] and Marinari cases.[16]

In the Dumaz case, the CJEU highlighted the manifestation of damage understood as a product of harmful effects, which are connected with the generating event in the place, which the victim indirectly suffers the damage.[17]

Instead, in the Marinari case the judges clarified the event as an expression of the generator of the damage intended to also include:

"(...) harmful consequences of an event that has already caused damage that actually occurred in another place (...) relevance was attributed to the place where the indirect patrimonial consequences of damage to the person suffered elsewhere were perpetrated (...)".

The concept of a harmful event is identified as a fact, that implies a possible liability for the defendant by proving the ascertainment of jurisdiction, as well as the fact that generated the actual liability, as a matter relating to the cause.[18]

Art. 7, n. 2 of the Regulation Brussels I-bis observes that the judge of the place where the harmful event is noted and the judicial authority of the place of the harmful event occur are based on Art. 5, n. 3 of the Brussels Convention. This article was inserted in Regulation n. 44/2001 without doubting the provision of the convention, that is applicable to injunctive

15CJEU, 11 January 1990, C-220/88, Dumez, ECLI:EU:C:1990:8, I-00049.

16CJEU, 19 September 1995, C-364/93, Marinari, ECLI:EU:C:1995:289, I-02719, parr. 14-15.

17CJEU, 11 January 1990, C-220/88, Dumez, op. cit., par. 20.

18CJEU, 16 July 2009, C-189/08, Zuid-Chemie, ECLI:EU:C:2009:475, I-06917, par. 26. 19 April 2012, C-523/10, Wintersteiger, ECLI:EU:C:2012:220, published in the electronic reports of the cases, par. 21.

actions.[19]

The jurisdiction of the judge and the provision regarding the reference to the damage must not have an abstract basis. The identification criteria are based on a future damage distinct from the damage that has occurred in the past. The verification of a future damage is therefore manifested by the previous one. Thus, two hypotheses arise.

In the first, the author announces the place that intends to harm the victim, as a suitable place to establish the relative jurisdiction for a future damage. The place is not knowable and the forum is identified on the basis of a specific case (Mankowski, 2016).[20]

As regards the remotely noticed torts, the relative interpretation was manifested by the CJEU through the Bier case. It led to the identification of two competent forums based on the principle of ubiquity.[21]

Remote tort means the fact that gives rise to the damage. Its harmful consequences are connected and located in various Member States and not only in a single territory. It will be useful to recall in this regard the Bier case, which damaged crops of a

19CJEU, 1st October 2002, C-167/00, Henkel, op. cit., par. 50.

20Mankowski affirms that: "(...) the place where the damage will occur cannot be identified on the basis of what has been announced by the person responsible (for example through a threat or other behaviour), it is necessary to take into consideration the place where the victim's goods (material or immaterial) are located, which may be the object of aggression (...)".

21CJEU, 30 November 1976, 21/76, Bier, op. cit., parr. 17-24.

recurring company, irrigated with the same waters.

The hypothesis of environmental pollution represents a typical example of remote illicit activity. It represents a polluting conduct when a state produces effects of considerable distance outside the national borders, thus creating damages also to other states. This category of remote illicit activities identifies the illicit ones and a plurality of facts, which as generators in various different countries cause illicit activities and damages, i.e. a manifestation localized in various states.

This is an orientation that respects the jurisdiction of the place of the unlawful conduct. In this way, the judge of the place verifies the harmful consequences[22] following the connecting criterion relating to the centre of gravity of an unlawful act, which attributes the jurisdiction to the judge of the place, according to the situation of the harmful fact.[23]

22CJEU, Conclusions of the Advocate General Capotorti, presented on 10 November 1976, in case C-21/76, Bier, ECLI:EU:C:1976:147, par. 7 and 10: "(...) the cumulation of the jurisdiction of the court of the place of the conduct and the jurisdiction of the court of the place of the harmful consequences, according to the Advocate General, was contrary both to the literal meaning of the provision (which speaks of a "judge" and not of "judges" of the place of the harmful event), and to the "spirit" of the Convention (...) which avoided the multiplication of forums (...)".

23CJEU, Conclusions of the Advocate General Capotorti, presented on 10 November 1976, in case C-21/76, Bier, op. cit., par. 6;: "(...) the possible interpretation of the rule in question on the basis of the "most significant approach" had been proposed in the observations submitted by the Netherlands and in those submitted by the Commission, and was based on the principle, of Anglo-Saxon origin, of the "proper law of torts", used in the sector of the choice of the applicable law (...) the criterion of the "preponderant connection" should have integrated that of the locus commissi delicti, correcting the unreasonable solutions to which the latter could have led in certain cases (...) this solution without dwelling on it (...) the criterion in question could not be accepted, both because it could have led to attributing jurisdiction to a judge other than the one textually indicated by the rule (that of the

The CJEU has followed the path of the ubiquitous principle, which requires the fact to be related to the unlawful act and the place that the original fact manifests the harmful consequences, thus representing connecting criteria, which are useful to facilitate the acquisition of evidence, which facilitate the conduct of the process.[24]

The principle of ubiquity completes a fundamental rule, that according to the Bier case, is the option of the forum. The actor chooses the action before the judge of the place, that the conduct of a given origin is carried out as well as the place that the damage is manifested.[25] This position deals with the provision on the special forum of the tort. It also observes the jurisdiction of the judge within the place of a harmful event, thus identifying the criteria that remain at the place during a lawsuit.

In such a case, also, the author suspends the illicit conduct and the harmful consequences of the nature for the same. The CJEU has affirmed its applicability of the principle of a perpetuatio

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place of the harmful event), and because it was a criterion which was not very objective, which would have left excessive discretion to the judge in determining his own jurisdiction, in contrast with the principles on which the Convention was based (...) it would have established a parallelism between jurisdiction and applicable law (making jurisdiction depend on considerations in (order to the applicable law) not permitted by the Convention itself (...)".

24CJEU, 22 January 2015, C-441/13, Hejduk ECLI:EU:C:2015:28, published in the electronic reports of the cases, par. 19. 21 May 2015, C-352/13, Peroxide, ECLI:EU:C:2015:335, published in the electronic reports of the cases, par. 40. CJEU, 16 January 2014, C-45/13, Kainz, op. cit., parr. 24-28 and 30-31. Conclusions of the Advocate General Jääskinen, presented on 19 April 2012, in case C-133/11, Folien Fischer, op. cit., parr. 46-47.

25CJEU, 30 November 1976, 21/76, Bier, op. cit., par. 19.

foro in the sector of torts.[26]

Remote torts and the role of the CJEU

Initially the Bier case and then the Zuid-Chemie and Kainz cases in the CJEU followed the ubiquitous principle in the field of litigation and in the field of damages from defective products. The CJEU clarified that the generating event for the damage caused by the defective product is part of the place, where the manufacturer has its headquarters and the place of manufacture of its product.

In the Zuid-Chemie case the CJEU stated that the harmful consequences are verified and the judge is seized respecting the place of production that coincides with the defect of the product, explaining the relative effects of the damage manifested in precise.

The liability of the director of a company, for the damages that are caused and within the exercise of his functions has followed in the CJEU various other paths. For example, it is recalled in the Ferho case,[27] that the judges of Kirchenberg stated that:

"(...) both the judge of the place of the "generating event" and the judge of the place of "materialisation of the damage" (...) must be identified in the place where the administrator habitually carried out his duties, while the second is located where the damage complained of by the administered company "concretely manifested" (...)".[28]

26CJEU, 5 February 2004, C-18/02, DFDS Torline, op. cit., par. 37.

27CJEU,10 September 2015, C-47/14, Ferho, ECLI:EU:C:2015:574, published in the electronic reports of the cases.

28CJEU, 10 September 2015, C-47/14, Ferho, op. cit., parr. 72-76-77.

In the Wintersteiger case it was reported that:

"(...) an action relating to the infringement of a trademark registered in a Member State by an advertiser operating for a search engine of another Member State may be brought, pursuant to Art. 5 no. 3 Brussels I Regulation (...) a "materialisation of the damage", which, in this case, coincides with the registration of the trademark (...) "fact giving rise to the damage" (...) is the advertiser's establishment, where the technical process aimed at the appearance of the advertisements started (...)".[29]

In the Pinckney case[30] it is stated that:

"(...) the interpretation of Art. 5 n. 3 Regulation n. 44/2001 in the light of the ubiquitous principle (...) provides clarifications regarding the location of the place where the damage occurs in the event of a copyright infringement perpetrated through the unauthorised online sale of musical pieces on material media (...) the damage occurs in every place where the internet site from which it is possible to obtain the musical work which is the object of the infringement is accessible (...) given the subjection of copyright to the principle of territoriality (...)".[31]

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29 CJEU, 19 April 2012, C-523/10, Wintersteiger, op. cit., parr. 29 and 37: "(...) identification of the place of the event generating the damage in cases such as the one in question, has excluded the relevance of the location of the server of the search engine on which the link to the website was uploaded by the perpetrator of the trademark infringement (...) is excessively uncertain and difficult to identify and could therefore not be considered as a jurisdiction, as it would conflict with the principle of foreseeability of the competent courts on which the Brussels I Regulation is based (...)".

30 CJEU, 3 October 2013, C-170/12, Pinckney, ECLI:EU:C:2013:635, published in the electronic reports of the cases.

31 CJEU, 3 October 2013, C-170/12, Pinckney, op. cit., par. 36, 39, 44: "(...) the identification of the place where the damage occurs varies depending on the type of right violated (...) (in case of) violation of an intellectual and industrial property right, the damage can only occur in the country where the trademark is registered, since only there is the aforementioned right protected. In the case of violation of personality rights and copyright rights, however, the damage can potentially arise in any Member State, since such rights are protected in all the states of the Union (...) unlike the solution adopted in the matter of violation of personality rights via Internet, for the hypotheses of violations of copyright via Internet (...) did not consider that the place where the damage occurs can be located, in addition to the various places where the website is accessible, also in the victim's centre of interests (...) excluded the relevance of the assessment of the addressing of the website towards a specific state in order to identify the place where the damage occurs, and this on the basis of the consideration that the rule on the forum of the offence does not contemplate this requirement unlike that relating to contracts concluded with consumers, pursuant to Art. 15, par. 1, letter c), Regulation No. 44/2001 (...)". 22 January 2015, C-441/13,

In the Peroxide case it is specified that:

"(...) the causal event of the damage from an anti-competitive agreement consists in the conclusion of the agreement itself, and that, therefore, it will be the judge of the place where such agreement was reached, who will be able to rule on the related dispute (...)[32] the agreement was not concluded in a single place, but was the result of a plurality of agreements, adopted in various circumstances (...) it is necessary to verify which of these agreements was the sole causal event of the damage[33] (...) (about) the materialisation of the damage, the court has stated that it must be placed in the place where the registered office of the company damaged by the anti-competitive agreement is located and the judge of that place will be able to hear the action for compensation for damages suffered by the company in its own territory of jurisdiction (...)".[34]

It is immediately noticeable that the nature of the ubiquitous principle is applied within the field of professional liability as is immediately noted in the Universal Music case,[35] which states that:

"(...) in hearing the action for damages brought by a recording company against some lawyers, who had made mistakes in drafting a contract between the same and another recording company, indicating a purchase price of the shares of the second by the first which was significantly higher than that actually agreed (...) the place where the damage arose, in the specific case,

Hejduk, op. cit., parr. 27-37. 18 October 2012, C-173/11, Football Dataco, ECLI:EU:C:2012:642, published in the electronic reports of the cases, parr. 36-39.

32CJEU, 21 May 2015, C-352/13, Peroxide, op. cit., par. 44.

33CJEU, 21 May 2015, C-352/13, Peroxide, op. cit., parr. 46, 47-48 and 50: "(...) the solution in the case in which among the various agreements through which the understanding was perfected there is not one in particular that can be identified as the sole and main causal event of the damage (...) there are several places in which the agreements that caused the damage were perfected, each of them is suitable to establish the jurisdiction to hear the compensation claim. Conversely, it could be argued that in such a case the conditions for the application of the ubiquitous principle do not exist and the competent court is only that of the place where the damage occurred (...) that the judge of the place of the causal event, identified according to the criteria illustrated above, is competent to hear the claims proposed against all the participants in the illicit understanding, regardless of the place in which the latter are established (...)".

34CJJEU, 21 May 2015, C-352/13, Peroxide, op. cit., parr. 52-55.

35CJEU, 16 June 2016, C-12/15, Universal Music, ECLI:EU:C:2016:449, published in the electronic reports of the cases.

should have been identified as the place where the parties had concluded the transaction (before an arbitration board), which had put an end to the dispute (...) it instead excluded that it could be considered relevant, in the absence of other connecting elements (...) that is to say the place where the bank of the company had its current account (...)".[36]

In the Kolassa case it was stated that:

"(...) the event generating the damage results from a bank violation of the information obligations towards investors (...) the content of the relevant information prospectuses, in case such prospectuses have been drawn up and distributed (...) in application of the ubiquitous principle, as an alternative to the judge of the aforementioned place, the investor who intends to complain about the bank's lack of information, can bring an action before the judge of the place where the damage occurred, which in this case coincides with the headquarters of the bank where his current account is held (...)".[37]

The CJEU has excluded the relative applicability of the principle of ubiquity. In the Reunion Europeenne case[38] it was stated, in this regard, that:

"(...) an action brought by some insurance companies against maritime carriers who, although not formally appointed, had provided for the transport of goods insured by the applicants, causing their damage (...)".

In the Marinari case it was also stated that:

"(...) the ubiquitous principle and the consequent optio fori for the plaintiff between the judge of the place of the event giving rise to the damage and that of the place where the damage occurred (...) cannot find space in cases where the "particular circumstances" justifying them do not exist (...) circumstances (...) in which the place of the event generating the damage is difficult, if not impossible, to determine (...) the plaintiff no longer has the possibility of choosing, and can only bring an action before the judge of the place where

36CJEU, 16 June 2016, C-12/15, Universal Music, op. cit., parr. 7, 31, 38-40: "(...) the concept of place of the damaging event contained in the provision on the forum of the tort cannot be interpreted in such an extensive way as to include the various places where all the "harmful consequences of an event that caused damage that actually occurred in another place" occurred (...) the place where the actual financial disbursement occurred does not represent a "reliable" jurisdictional title in cases (such as the present one) in which the injured party can choose between current accounts in various countries (...)".

37CJEU, 28 January 2015, C-375/13, Kolassa, op. cit., par. 55.

38CJEU, 27 October 1998, C-51/97, Réunion européenne, ECLI:EU:C:1998:509, I-06511, par. 8-9.

the damage occurred (...)".[39]

The Shevill case: personality rights through press defamation

The Shevill case[40] advances a relative interpretation:

"(...) to the place where the harmful event occurred referred to in Art. 5 no. 3 of the 1968 Brussels Convention with respect to a case of transnational defamation perpetrated through the press (...)".

The court took a stand for the dispute of a French publishing house, which published an article for the first time and accused it of money laundering. The newspaper was first distributed in France and the copies were later sold in the United Kingdom. Mrs. Shevill relied on compensation for damages for press defamation before the English courts. The House of Lords made the relevant preliminary reference to the Court of Justice, asking whether the English court had jurisdiction, according to Art. 5, no. 3 of the Brussels Convention.

The CJEU highlights the ubiquitous principle and the optio fori with reference to the action for compensation for material damages, which find application to actions having as their object the compensation for immaterial damages, which derives from

39 CJEU, 27 October 1998, C-51/97, Réunion européenne, op. cit., par. 29: "(...) the optio fori that derives from the interpretation of art. 5 n. 3 of the Brussels Convention in light of the ubiquitous principle cannot lead to "emptying of content" the principle on which the Convention itself is based (...) in general, to the judge of the defendant's domicile and only in exceptional cases, expressly provided for, can there be room for hypotheses of fora actoris (...) the provision on the forum of the tort can attribute jurisdiction both to the judge of the place of the generating event and to that of the place of the harmful consequences only if both places, in the specific case, are equally close to the dispute (...)".

40 CJEU, 7 March 1995, C-68/93, Shevill, ECLI:EU:C:1995:61, I-00415.

the defamation of a natural person, through the publication of an article published in a magazine.[41]

According to the CJEU, the generating event for the damage does not coincide with such damage, which is specified through the jurisdiction, according to Art. 5, n. 3 of the Brussels Convention. It is therefore up to the judge and to the plaintiffs to make the choice between the seized judges.

Therefore, the CJEU states that the place of the generating event is not the same as the manifestation of the damage from press defamation. These are places, which are located with the place of establishment and the publisher of a publication of a defamatory element. In this regard, the CJEU "was formulated and put into circulation".[42] This is an expression that is used and

41 CJEU, 7 March 1995, C-68/93, Shevill, op. cit., par. 23.

42 CJEU, Conclusions of the Advocate General Darmon, presented on 14 July 1994, in case C-68/93, Shevill, ECLI:EU:C:1994:303, par. 111: "(...) the publisher's place of establishment normally coincides with the defendant's place of domicile, on which the general rule of jurisdiction established by Art. 2, paragraph 1 of the Convention is based (...) the need to affirm the jurisdiction of the courts of the places where the damage occurred, otherwise the forum of the tort would be deprived of practical utility (...) Art. 53 of the Brussels Convention made the domicile of legal persons coincide with their seat, to be determined on the basis of the rules of private international law of the state of the forum. Regulation no. 44/2001 and Regulation no. 1215/2012 directly establish that the domicile of legal persons corresponds to the registered office or its central administration or its principal place of business (...) there could be cases in which there was no coincidence between the domicile of a company and its place of establishment (when the private international law of the forum distinguished these concepts), starting from the Brussels I Regulation such cases are almost completely disappeared (...) this coincidence may disappear if the company transfers its domicile after the commission of the unlawful act but before the commencement of the proceedings (...) the relevant domicile for determining the general forum, pursuant to Art. 4 of Regulation no. 1215/2012, is the one existing at the time of the commencement of the proceedings; the place of establishment of the publisher, as the place of the event generating the damage, relevant for establishing the forum of the unlawful act, is the one existing at the time of the unlawful act (...)".

refers in a unique way to the main establishment and to a single secondary office of the publisher (Màrton, 2016). Thus, an initial and irrelevant fact is attributed to the precise establishment at the time the fact occurs. The Shevill case represents the principle of the initial causal fact, as a guiding criterion for the selection of the fact and as a generator of the damage, that is relevant for complex torts.[43]

The precise place of damage is identified by the collaboration of some criteria, such as the diffusion of the publication, as well as the knowledge of the victim. The damage to the reputation and honor of the person is caused in each Member State from the publication, which has spread.

The place of distribution is understood and distributed to retailers through the sale to readers and buyers. The CJEU refers to the distribution to its readers and the distribution of the publication to its retailers without representing the damage that respects its victim. This is a damage, that is specified through the defamatory information and knowledge of the public for the readers (Màrton, 2016).[44]

Various doubts exist on the relative requirement for the victim's knowledge regarding the state of the forum. Therefore, the CJEU has affirmed the relative competence of the judicial

43CJEU, 16 January 2014, C-45/13, Kainz, op. cit., par. 33. 28 January 2015, C-375/13, Kolassa, op. cit., par. 53.

44CJEU, 7 March 1995, C-68/93, Shevill, op. cit., par. 53.

authority of a state to the knowledge in its own territory, i.e. of the state that the victim is known and has suffered damage to his reputation.[45] This is an option that shows that the jurisdiction of the judge of that state for the victim, who was not known even before its publication, is unreasonable (Nagy, 2012; Svantesson, 2012).

This is a position that highlights the solution of certainty and predictability of the relevant competent court by the publisher of the relevant publication. The victim can thus turn to the jurisdictional authorities that he has known even before the publication (Wagner, 2005).

Another position that is not clarified concerns the criteria that identify the place of manifestation of one's own damage, including the damage to the reputation of the victim. These are positions that unreasonably observe the place of distribution of the publication as well as the victim who has suffered the damage to his reputation. It does not coincide but considers the requirements that cumulatively chase to deny the jurisdiction of the judges in both places (Kaye, 1999).

In this regard, the place of distribution where the victim suffers

45CJEU, Conclusions of the Advocate General Darmon, presented on 14 July 1994, in case C-68/93, Shevill, op. cit., par. 29, 30: "(...) the place where the damage occurs is "where the publication is disseminated, when the victim is known there", in paragraph 30 and in the operative part the Court concludes that the jurisdiction of the "judges of each state in which the publication is disseminated or the victim claims to have suffered damage to his reputation" (...) "knowledge of the victim" was an autonomous requirement or an exemplification of the requirement of damage to the reputation of the victim (...)".

damage to his reputation does not coincide with the place of information and knowledge of the public. In other words, these are forms different from the intentional distribution of the publisher.

A varied and broad interpretation is adopted for the concept of distribution for the hypotheses, that the news known to a given public excludes the place of the victim, who has suffered damage to his reputation, because it does not coincide with the distribution of the related meterial damage.

The CJEU has highlighted the jurisdiction of the judges of the places identified, as well as the possibility for the plaintiff to choose, who he/she appeals to, thus providing for and differentiating the extension of the jurisdictional power of its judges. It is specified that the judge of the place of establishment of the publisher is also competent to know the relative claim as well as the relative damages, which are caused by its illicit publication, which are suffered by the victim, as well as the publication spread for the victim known and competent for the manifestations of the national territory.[46]

Regulation Bruxelles I-bis and n. 44/2001 of the Brussels Convention of 1968 attribute to the judges the provisions, which are contained in the disputes and which provide for divisions by

46CJEU, 7 March 1995, C-68/93, Shevill, op. cit., par. 30: "(...) principle of good administration of justice, if the defamation has been perpetrated in the territories of several states, the judicial authority of each of them is the most qualified to assess the damages suffered by the victim in its own territory (...)".

adopting solutions for the type exposed.[47]

In the Pinckney case, the CJEU highlighted that:

"(...) pursuant to Art. 5 no. 3 of Regulation no. 44/2001, the jurisdiction to hear claims for damages for infringement of copyright belongs to the courts of the various states in which the illegitimate copy of a work was available (...) competent to hear only the damage that occurred in the territory of the state of its headquarters (...)".[48]

In the Hejduk case, the CJEU specified the:

"(...) division of jurisdiction in relation to a dispute that arose from the infringement of the economic and moral rights of the author through the unauthorized publication on a website of some photographs (...) the courts of the Member States in which the website is accessible are competent to hear such disputes, with the specification that the jurisdiction of each court is limited to the damage that occurred in its own national territory (...)".[49]

It is immediately noticeable that the jurisprudence has consistently highlighted that the multi-localised offence raises doubts on the compatibility of the provisions of the Brussels I-bis regulation. This is the basis on which the orientation of the CJEU is based.

The eDate Martinez case as defamation via internet

Many years after the Shevill case, defamation as a specific offence has come back, but this time it concerns the violation of rights and personality via Internet.[50] We are talking about the

47See Art. 83 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs in OJ L 3 of 05.01.2002, pp. 1 – 24, which, in Art. 83. Art. 101 of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, in OJ L 227 of 01/09/1994, pp. 1 – 30.

48CJEU, 3 October 2013, C-170/12, Pinckney, op. cit., par. 45. CJEU, 22 January 2015, C-441/13, Hejduk, op. cit, par. 24.

49CJEU, 22 January 2015, C-441/13, Hejduk, op. cit., par. 36.

50CJEU, Conclusions of the Advocate General Cruz Villalón, presented on 29 March 2011 in joined cases: C-509/09 and C- 161/2010, eDate Advertising GmbH

eDate-Martinez case of 25 October 2011,[51] which after two preliminary references the national judicial authorities[52] have given an interpretation to the expression of the place where the damaging event occurred and/or it occurs, according to Art. 5, n. 3 of the Regulation n. 44/2001, i.e. when the damaging event is part of the publication of a website for materials harmful to the reputation and honor of the person.

The referring judges wanted to obtain a clarification regarding the competent forum. In such a case the regulation norm recognizes the inhibitory and compensatory actions for the victim of online defamation.[53]

The CJEU has taken a position and reiterated the principles, that are also highlighted in the Shevill case, stating that they apply to the violation of personality rights by means other than the

and others v. X and Société MGN LIMITED, ECLI:EU:C:2011:192, parr. 50-51; See also Marton, op. cit., p. 201 and Svantesson, op. cit., p. 324.

51CJEU, 25 October 2011 in joined cases: C-509/09 and C-161/2010, eDate, ECLI:EU:C:2011:685.

52CJEU, 25 October 2011 in joined cases: C-509/09 and C-161/2010, eDate, op. cit., parr. 10-14 and 15-24.

53Art. 5 n. 3 of Regulation n. 44/2001 and Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), in OJ L 178, 17.7.2000, pp. 1-16). see also from CJEU, 25 October 2011 in joined cases: C-509/09 and C-161/2010, eDate, op. cit., par. 24 and 29 which is affirmed that: "(...) whether they are conflict of law rules or whether they represent a corrective to national conflict of law rules (...) the order for reference had asked whether, in order to determine jurisdiction pursuant to Articles 2 and 5 no. 3 of Regulation no. 44/2001 to hear an action concerning violations of personality rights via internet, the requirement of the mere possibility of consulting the site in the territory of the state of the judicial authority is sufficient, or whether a "sufficient, substantial and significant connection" between the state of the forum and the dispute is necessary and how such connection should be determined (...)".

press.[54]

The CJEU highlights and distinguishes the respect of other means of communication, namely data uploaded on the web, that are ubiquitous and consulted instantly by a world of an indeterminate number of subjects. This is a peculiar specification where the criteria developed determine the place that specifies the damage, namely the diffusion, distribution of the publication.

The logic of the CJEU relating to the hypotheses of defamation by means of the press, as a criterion that leads to the identification of the jurisdiction of a limited number for the judges, as well as for the paper copies and magazines that are distributed to a precise number of states in the case of online defamation, leads to the affirmation of the jurisdiction of the judges for all the Member States given the accessibility and the global principle of the websites.[55]

The criterion, principle of accessibility disadvantages the victim of defamation via internet. The victim can obtain, therefore, compensation for the damages suffered in his reputation (Nagy, 2012). This criterion is valid for the victim of defamation. The victim suffers damages in his reputation by a high number of states but applying the mosaic approach adopted through the

54CJEU, 25 October 2011 in joined cases: C-509/09 and C-161/2010, eDate, op. cit., par. 39 and 44.

55CJEU, 25 October 2011 in joined cases: C-509/09 and C-161/2010, eDate, op. cit., par. 46.

Shevill case he can present a lawsuit before the judges of each state for damages.[56]

The CJEU has taken a position regarding the principles of the old Shevill judgment through an introduction that corrects the title of jurisdiction of the place, that specifies the damage. In this way, the competent judge is identified.

The judge, according to the CJEU, should be the one that the victim of defamation is in the center of his interests as stated in par. 48 of the judgment on the matter and coincides with the place of residence and of the exercise of the professional activity of the victim.

The principles of good administration of justice and the predictability of the rules for jurisdiction put the judge at the center of the interests of the victim. It becomes suitable to evaluate the harmful consequences for the publication of one's own defamatory content, thus provoking the offended person online.[57]

The forum is foreseeable for the victim and the perpetrator of

56CJEU, 25 October 2011 in joined cases: C-509/09 and C-161/2010, eDate, op. cit., par. 47 and 56: "(...) online defamation causes the victim more serious damage to his or her reputation (because it is more widespread) than defamation in the press (...) it is unreasonable that in these cases the victim should suffer a worsening of his or her position as a result of the application of the so-called mosaic approach, rather than greater protection (...)".

57CJEU, 25 October 2011 in joined cases: C-509/09 and C-161/2010, eDate, op. cit., par. 48. CJEU, 30 November 1976, 21/76, Bier, op. cit., par. 11.CJEU, 11 January 1990, C-220/88, Dumez, op. cit., par. 17; CJEU, 7 March 1995, C-68/93, Shevill, op. cit., par. 19. CJEU, 19 September 1995, C-364/93, Marinari, op. cit., par. 10. CJEU, 16 July 2009, C-189/08, Zuid-Chemie, op. cit., par. 24.

the offence is able to know his centre of interests.[58] In particular, the Advocate General Cruz Villalòn stated, in this regard, that:

"(...) adapt the principles set out in the Shevill judgment with respect to the hypotheses of defamation via the web by introducing a further competent forum, to be identified through the criterion of the "centre of gravity" of the conflict (...) it must be identified taking into account not only the centre of interests of the victim, but also the place where the damage to the reputation has "manifested itself with greater intensity" (...) it coincides with the place where the defamatory news arouses greater interest in the public[59] (...) the centre of interests of the victim is competent to know the totality of the damages suffered by the injured party (...) the defamatory information was capable of arousing the interest of local readers (...) only if the information is of objective interest in the territory of its competence (...)".

Reading carefully the conclusions of the Advocate General it is noted that the plaintiff, respects the centre of gravity of a conflict, as well as the centre of interests of the victim. Furthermore, the judges of the Member States are informed of the defamatory action and have access to information about it. In fact, the new eDate-Martinez case has highlighted a provision relating to the forum of the offence, according to art. 5, no. 3 of

58CJEU, 25 October 2011 in joined cases: C-509/09 and C-161/2010, eDate, op. cit., par. 50.

59CJEU, Conclusions of the Advocate General Cruz Villalón, presented on 29 March 2011 in joined cases: C-509/09 and C- 161/2010, eDate Advertising GmbH and others v. X and Société MGN LIMITED, op. cit., parr. 58-61: "(...) to identify the competent court in matters of online defamation, the so-called targeting test, stating that, unlike what is provided for in the provision relating to the special forum in matters of contracts with consumers, pursuant to art. 15, no. 1, letter c), Brussels I Regulation, art. 5 no. 3 of the same did not contain any textual reference that would allow to attribute relevance to the intentional addressing by the publisher of the publication towards a given place (...) to verify the existence of the requirement of objective relevance of the defamatory information, it is necessary to take into account as a priority the content of the same, and on a purely circumstantial basis also the top level domain of the website, the language in which the information on the website is available (...) the keywords provided to search engines by the website manager and, finally, the data on accesses to the web page (...) the same elements mentioned by the Advocate General represent the main clues to determine the addressing of the web page, based on the so-called targeting test. targeting test (...)".

the current Regulation of Brussels I, as well as the ubiquitous principle of the optio fori according to the Bier case, affirming in such a way the jurisdiction of the judge of the place of the event generating the damage and the place on which the same is based.

The CJEU has highlighted and considered the hypothesis of defamation that is positioned in the place of establishment of the subject, who issued the contents damaging the reputation of the victim.[60] It has been the CJEU to attribute in a unique way to the establishment regardless of the conduct of the illicit and the creation of the content and the decision to upload online and on the website and to save the data on the server.

The CJEU has stated that it attributes the relative competence to the judges of the various Member States where the defamatory information is accessible.[61]The jurisdiction thus represents the relative adjustment for online defamations and the distribution

60CJEU, 25 October 2011 in joined cases: C-509/09 and C-161/2010, eDate, op. cit., par. 52: "(...) to the forum of the place of establishment of the author of the unlawful act, limiting itself to a substantial confirmation of the criterion developed in the Shevill judgment, with the sole substitution of the expression "subject who issued such contents" (editor's note: the defamatory contents) in place of "publisher" (...) identified, the problems already emerged in the Shevill judgment arise again regarding the tendency for the same to coincide with the general forum of the defendant's domicile pursuant to art. 2, par. 1 of the Regulation no. 44/2001, now Art. 4, par. 1 of the Regulation no. 1215/2012, and the consequent risk of its practical uselessness (...) the generic nature of the expression "subject who issued the contents" (...) expression as referred to the so-called content provider, i.e. the subject who physically uploaded the data to the internet (...) reference to the "place of establishment of the publisher of the publication" infringing the rights of personality (...)".

61CJEU, 25 October 2011 in joined cases: C-509/09 and C-161/2010, eDate, op. cit., par. 51.

criterion for defamatory publications as in the Shevill case. It has not highlighted the criterion that combines with the knowledge of the victim, that has considered the place of the digital information accessible to the place of the damage and of the victim who is known (Kuipers, 2012).

The CJEU referred to the centre of interests of the victim as well as to the place where the damage is specified, which respects the place of a defamatory and accessible content as a title of autonomous jurisdiction (Lutzi, 2017), thus introducing the criticisms, that are connected with the criterion of accessibility and the division of disputes entailed in cases of online defamation for the aforementioned solutions.[62]

The reasoning pursued was that of jurisdiction for the identified forums based on criteria that the judge maintained and provided for, namely the criterion of accessibility of the damaging material, which has the power to know the damages that are specified in the national territory.

The judge of the place instead establishes the subject, who issued the defamatory content. He knows all the damages, as well as anything that the victim has suffered. In contrast to the Shevill case, a new criterion is identified, namely the victim's center of interest, as a solution, that is consistent with the reasoning of the introduction that offers access to the

62CJEU, 25 October 2011 in joined cases: C-509/09 and C-161/2010, eDate, op. cit., par. 48.

jurisdictional protection of the victim, who has suffered online defamation as a seriousness of an injury and due to an offensive capacity for the relative means used.

Legal persons and damage to their reputation. Forum and injunctive actions

Referring to online defamation relating to legal persons, we immediately recall the Ilsjan case.[63] This is a preliminary reference that originates from the action brought before the Harju Court of First Instance in Estonia by the Estonian company and its employee Mrs. Ilsjan against the Swedish company Svensk Handel.

The appellants complained that they had made their names appear on the website on a blacklist accused of fraud and scams, provoking comments in the forum users who are present on the site. The appellants asked the Estonian judge to order the Swedish company to make the relevant correction for the information which was incorrect and contained on its website.

The court in question declared that Estonia did not consider the place of the harmful event, according to Art. 7, n. 2 of the Regulation n. 1215/2012, despite the defendant's website being accessible for the country since the content was in Swedish and

63CJEU, 17 October 2017, C-194/16, Ilsjan, ECLI:EU:C:2017:766, published in the electronic reports of the cases, parr. 9-14. See also the conclusions of the Advocate General Bobek, presented on 13 July 2017, in case C-194/16, Ilsjan, ECLI:EU:C:2017:766, parr. 10-16.

not in Estonian language. This is a decision that was upheld by the court of appeal in Talin.

The CJEU has sought to resolve and interpret a question relating to the applicability of the criterion concerning the centre of interests of the victim, as well as disputes where the injured party is a legal person.[64]

The criterion of accessibility for the website as elaborated in the judgment and with reference to the compensatory actions is valid for determining the jurisdiction to cognise injunctive actions, which are directed and obtain the removal from a website of the relevant defamatory content.[65]

The questions that have arisen concern the ubiquitous principle as well as the principles that are elaborated through the Shevill and eDate-Martinez cases[66] as well as within the analysis of the criterion concerning the center of interests of the victim. Thus, it has reiterated that the individual forum is based on the criterion, that evaluates the harmful consequences for the publication via web of the relative defamatory content, which foresees the

64CJEU, 17 October 2017, C-194/16, Ilsjan, op. cit., par. 21. 25 October 2011 in joined cases: C-509/09 and C-161/2010, eDate, op. cit., parr. 47-48: "(...) the victim of online defamation is a natural person. The interpretative doubt that arose before the Estonian court was whether the criterion of competence of the centre of interests of the victim, introduced in consideration of the particular disadvantaged condition in which the victim of online defamation finds himself (...) also applies to legal persons, even though the latter are not normally considered weak subjects, deserving of particular protection (...) in the case of an affirmative answer to the above question, to specify the criteria for determining the centre of interests of legal persons (...)".

65CJEU, 17 October 2017, C-194/16, Ilsjan, op. cit., par. 21. 25 October 2011 in joined cases: C-509/09 and C-161/2010, eDate, op. cit., parr. 17 and 24.

66CJEU, 17 October 2017, C-194/16, Ilsjan, op. cit., parr. 29, 31-32.

victim and the author of the illicit act.[67]

The material and immaterial nature of the damage complained of does not affect the validity of the relative criterion under investigation. Thus, the state judge is at the center of interests and the victim of an online defamation is competent for the material and immaterial damages suffered by the victim.[68]

A clarification regarding the preliminary question for the nature of the damage caused by a defamatory publication is an element that seeks to differentiate legal and natural persons. This difference fuels doubts for legal persons, that determine the competent forum and the criterion of the center of the interests of the victim, that are elaborated by the CJEU with reference to natural persons.

The doubt was fueled by a general question, that legal persons are considered holders of personality rights and speak of violations on them. It was also, in this regard, the ECtHR that referred to a recognition relating to the ownership of legal persons and personality rights, according to the right of reputation.

We recall the Fayed v. United Kingdom case of 21 September 1990 referring to the national legal systems of various Member States and in particular the rights regulated by legal persons in

67 CJEU, 17 October 2017, C-194/16, Ilsjan, op. cit., parr. 33-35.

68 See also the conclusions of the Advocate General Bobek, presented on 13 July 2017, in case C-194/16, Ilsjan, op. cit., parr. 36-37.

relation to disputes for defamation of legal persons applicable to the provision of the forum for tort and the current Regulation Brussels I-bis.

It is clarified that legal persons are victims of defamation via Internet, who appeal to the jurisdictional authority of the state, that is at the center of interests for compensation for all damages suffered.

In particular, the Advocate General in his conclusions highlighted some doubts regarding legal persons, that are more rigorous as regards the forum; and that the forum of the center of interests of the victim introduces a greater severity after the case eDate of 2011 on the injury suffered by the victim to a defamation, that is committed via Internet.[69]

The Advocate General criticized that legal persons are considered very strong while natural persons are weak. They did not take into account borderline cases for legal persons as well as for individual and natural enterprises, which influence cases of online defamation and which verify the two-party eventuality, which present the power relationship, that respects the basis defamed-weak party with defamed-strong party, as an example for the author of a small blogger, i.e. natural person, legal person as a victim of a rich, famous person. It is a subordination that identifies the competent forum in the matter under examination

69See also the conclusions of the Advocate General Bobek, presented on 13 July 2017, in case C-194/16, Ilsjan, op. cit., par. 62.

for assessments to the power relationship, which the parties are in conflict with the principle of foreseeability for the rules of competence to a special forum of an unlawful act that must respect.

The doubt of a favorable interpretation of the forum of the tort is not necessary for defamation, which affects a legal person, that is a subject of its own rigorous nature.[70]

The CJEU has followed the criterion of the center of interests. The victim of online defamation guarantees the good administration of justice and the non-protection of its actor. It is irrelevant whether the actor is a legal or a natural person. The reasoning followed integrates the forum of the tort, according to Art. 7, n. 2 of the Regulation n. 1215/2012. This is a provision that is part of sections 3, 4 and 5 of the Regulation. It favors the legal relationship as a forum close to the dispute.

The provision on the forum of the tort does not interpret the principle of favor actoris, but the title of jurisdiction of the center for the interests of the victim outside the relationship of power that exists between the parties as victim.[71]

The resolution line follows the criteria for determining the centre of interests of legal persons, who have identified the location of the legal person, which carries out:

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70 See also the conclusions of the Advocate General Bobek, presented on 13 July 2017, in case C-194/16, Ilsjan, op. cit., par. 62.

71 See also the conclusions of the Advocate General Bobek, presented on 13 July 2017, in case C-194/16, Ilsjan, op. cit., par. 39.

"(...) its economic activity (...). The centre of interests of the entity normally coincides with its statutory headquarters, the location of the latter should not be given decisive importance (...)" (Bizer, 2018).[72]

The eDate case with respect to natural persons,[73] as well as the Ilsjan case, have excluded that legal persons can benefit from the criterion of the centre of interests in their place and the statutory seat. It has been stated that legal persons have the burden of providing the judge with elements proving the economic activity carried out by the state in their own forum. This burden does not absolve the centre of interests, which does not determine for legal persons to benefit from the relevant forum.[74]

The CJEU has followed the path that uses the criterion of accessibility of the website. This determines the jurisdiction and knows the compensatory and inhibitory actions of those directed to obtain the rectification and removal from the web of its defamatory contents. The criterion of accessibility on the website refers to inhibitory actions and presupposes the

72See also the conclusions of the Advocate General Bobek, presented on 13 July 2017, in case C-194/16, Ilsjan, op. cit., par. 41.

73CJEU, 25 October 2011 in joined cases: C-509/09 and C-161/2010, eDate, op. cit., par. 49.

74See also the conclusions of the Advocate General Bobek, presented on 13 July 2017, in case C-194/16, Ilsjan, op. cit.,par. 116-117: "(...) the rationale underlying the criterion of the centre of interests of the victim, as explained by the court in the previous passages of the judgment (...) namely that of identifying a forum which has effective and significant links with the dispute and not that of providing a forum which is particularly favourable to the plaintiff, since it is close to him (...) leaves open the possibility that there are a plurality of centres of interests (both of natural persons and of legal persons), located in different states, all equally relevant, with the consequent recognition by the plaintiff of the right to choose between the judges of such different places (...)".

confirmation by the CJEU of the approach followed in the past. It was the Advocate General Bobek, who through his conclusions in the Ilsjan case stated to

"(...) reduce to two the titles of jurisdiction: the place of the event generating the damage, consisting of the place from which the defamatory information originates (...) and the place of concretization of the damage, coinciding with the place where the victim has the center of his interests (...)".[75]

This is a position not obtained by the part of the CJEU but it responds to the question of the referring judge, who confirmed what was said from the eDate-Martinez case.[76]

This is a confirmation that refers to direct actions, which obtain compensation for their damage (Lutzi, 2019). This establishes the approach, that determines the jurisdiction for inhibitory actions. Unlike the compensation claim, the inhibitory claim obtains the rectification and removal of defamatory content on a website, which is universally accessible in an indivisible manner

75See also the conclusions of the Advocate General Bobek, presented on 13 July 2017, in case C-194/16, Ilsjan, op. cit., par. 88, 90 is affirmed that: "(...) the need to overcome the so-called mosaic approach was imposed by the most serious inconvenience that it entails (...) which is contrary to the principles of foreseeability of the rules on jurisdiction and the good administration of justice, not even responding to the interests of any of the parties (...) the title of jurisdiction based on the accessibility of the website does not even respond to a (legitimate) interest of the plaintiff, who cannot derive any advantage from the initiation of cases before the various competent judges by virtue of the aforementioned criterion in order to obtain partial compensation (...) the possibility that the accessibility criterion guarantees to the plaintiff to initiate actions of disturbance to the detriment of the defendant does not represent a legitimate interest, worthy of consideration (...)".

76CJEU, Conclusions of the Advocate General Hogan, presented on 16 September 2021 in case: C-251/20, Gtflix Tv.v DR, ECLI:EU:C:2021:745, published in the electronic reports of the cases, par. 48: "(...) deliberately avoided taking a position on the question of whether or not to maintain the patchwork approach adopted in the area of compensation (...)".

(Bogdan, 2018).[77] This is a position that concerns the inhibitory protection requested by judges, who have jurisdiction over the totality of the damages suffered. Therefore, it does not require judges competent to know damages that have occurred in their respective national territories.

The jurisdiction for inhibitory actions for online defamation belongs to the judge of the place where the subject who issued defamatory content is established. The state that is at the center of the victim's interests is considered by the competent judge, according to the criterion of accessibility of the website.[78]

The reasoning followed partly shares the conclusions of the Advocate General and the consequences for the recognition of the competence for the inhibitory action to all judges, who are equipped with jurisdiction, according to the criterion of

77See also the conclusions of the Advocate General Bobek, presented on 13 July 2017, in case C-194/16, Ilsjan, op. cit., par. 48, 126-127: "(...) the damage from online defamation has a single source, namely the content of the website. In order to stop the damage, therefore, the content must be modified or removed in its entirety, since it is not conceivable that the modification or removal would be only proportional to the damage suffered in a given territory (...) it could however be critically observed that an inhibitory protection limited to the portion of damage that occurred in a given state could be achieved through geographical blocking tools, which inhibit, precisely, access to the site by users of a given country (...)".

78CJEU, Conclusions of the Advocate General Bobek, presented on 23 February 2021, in case C-800/19, Mittelbayerischer Verlag KG v. SM, ECLI:EU:C:2021:124, published in the electronic reports of the cases, parr. 34-35: "(...) the principle according to which judges with limited jurisdiction "based on the mosaic approach" have the power to issue only "divisible" provisions, while judges with full jurisdiction (such as, in particular, the judges of the State of the centre of the victim's interests) can issue both "divisible" and "indivisible" provisions (...) must be understood as sentences of condemnation to compensation for damages in monetary equivalent, while the latter must be understood as provisions for rectification and removal of the damaging information (...)".

accessibility. The inhibitory protection is unique and indivisible and the risk also makes possible the adoption of a plurality of provisions, which are inhibitory and the divergent content with a direct way to the conduct of an uncertain situation for the recipient of the same (Lutzi, 2020).[79]

National dignity and identity rights

The concept of the centre of interest for violations of personality rights via Internet was also referred to in the Mittelbayerischer Verlag case.[80] The German company Mittelbayerischer Verlag KG published an article online, for the life of a Jew saved from the Holocaust during the Treblinka concentration camp, which was described as a "Polish extermination camp".[81]

A Polish citizen before the regional court in Warsaw, the city where the registered office of the company Mittelbayerischer Verlag is located, accused of having violated his rights relating to national dignity and identity, since the content of the article created the wrong belief in the readers, i.e. that the

79 See also the conclusions of the Advocate General Bobek, presented on 13 July 2017, in case C-194/16, Ilsjan, op. cit., par. 129: "(...) the presence of those subjects (such as, for example, users of a social network or the editors of an online encyclopedia) who do not have the tools to block publication with respect to only some of the Member States and would therefore find it difficult to enforce an injunction with limited territorial effectiveness, finding themselves forced in any case to completely eliminate the content published by them (...)".

80 CJEU, 17 June 2021, C-800/19, Mittelbayerischer Verlag KG v. SM, ECLI:EU:C:2021:489, published in the electronic reports of the cases.

81 CJEU, 17 June 2021, C-800/19, Mittelbayerischer Verlag KG v. SM, op. cit.., par. 9.

extermination camp had been created by Poles responsible for the crimes committed. The dispute was distinguished from previous ones since the plaintiff complained about the violation of the right to honour as well as reputation. The violation of the rights to national dignity and identity it was linked to the subject belonging to a certain nation.

The jurisdiction of the court was invoked on the basis of the principle of the centre of interests of the victim during the proceedings.[82] The defendant company with regard to the title of jurisdiction and the centre of interests of the victim did not influence the case, since the plaintiff complained about the violation of personality rights and did not refer to a person but indiscriminately to a community of subjects to which he belonged.

The Polish court of first instance rejected the defendant's arguments based on Art. 7, no. 2 of the Brussels Regulation I-bis. The court order in the Mittelbayerischer Verlag case brought the relevant appeal to the Court of Appeal in Warsaw after the relevant complaint for violation of the rule of the Regulation. The national court decided to follow the path of preliminary reference and requested the respect of his personality rights due to an online publication which had information regarding the community to which he belongs, thus

82CJEU, 17 June 2021, C-800/19, Mittelbayerischer Verlag KG v. SM, op. cit., parr. 14- 17.

affirming the jurisdiction of the court and the centre of interests of the victim, according to Regulation no. 1215/2012.[83]

The referring court posed a question to the court for the violation of personality rights via Internet. The competent judge based his decision on the place of the damaging event as well as on relevant elements such as the public that addresses the website with the damaging content, the language of the website available and the period of the offensive information that remained available with individual characteristics to the plaintiff, thus emerging his legitimacy that resorts to his own publication.

The CJEU relied on a restrictive interpretation regarding the derogating provisions. The competent court was based on the certainty of law and the foreseeability of its own jurisdiction. The CJEU highlighted the facts concerning the remote tort, the centre of interests for the victim and the foreseeability of the jurisdiction for the injurer. This highlights the difference for the case under judgment, which is being dealt with the eDate case as well as the Mittelbayerischer case, in which the plaintiff denounced a violation of the rights to national identity and dignity through a text published online, which did not contain any reference to himself and to the community he belongs, i.e. the Polish people.

83CJEU, 17 June 2021, C-800/19, Mittelbayerischer Verlag KG v. SM, op. cit.,par. 23.

The assertion of the jurisdiction, according to the centre of interests of the victim, violates the principles, the foreseeability of the rules relating to the jurisdiction and the certainty of law. The author of the relevant publication did not know that the centre of interests of the persons were not referred to it. The examination criterion that complied with the competent courts was devoid in a close connection with the dispute.

Art. 7, n. 2 of the Brussels Regulation I-bis interpreted the violation of personality rights via internet. The judge was competent for the damages suffered by the injured party as a directly and indirectly identifiable result of the related damaged content. The conclusions of Advocate General Bobek highlighted that:

"(...) the appropriate opportunity to reconsider the case law in the matter in question[84]- had suggested to the Court to adopt a solution that would contribute to better delineating the criterion of the victim's centre of interests (...) to be identified with regard not only to the injured party and the damage suffered by him, but also to the objective content of the publication (...) to interpret the provision on the forum of the unlawful act in such a way as to attribute jurisdiction with respect to cases of infringement of personality rights via internet to the judicial authorities of the Member State (...) the damaging information is of objective interest to the public[85] - interpretation of

84CJEU, Conclusions of the Advocate General Bobek, presented on 23 February 2021, in case C-800/19, Mittelbayerischer Verlag KG v. SM, op. cit., par. 43. See also the conclusions of the Advocate General Bobek, presented on 13 July 2017, in case C-194/16, Ilsjan, op. cit., parr. 73-90; v. supra, par. 5).

85CJEU, Conclusions of the Advocate General Bobek, presented on 23 February 2021, in case C-800/19, Mittelbayerischer Verlag KG v. SM, op. cit., parr. 64-65: "(...) this criterion is to be preferred because it is able to better specify the two factors to be taken into consideration in identifying the competent judge in the case of online defamation, one focused on the person of the victim and the other on the objective content of the publication (...) from the court's option in favour of the different criterion of the centre of interests of the victim it is not possible to draw a position against the relevance of the second of the aforementioned factors (...) it could be

the provision respects the objective of predictability of the competent forum, indicated in recitals 15 and 16 of the Brussels I-bis Regulation (...)".[86]

The CJEU has oriented itself towards the operation of the victim's centre of interests and the identifiability of the harmful content that has been published online. The jurisdiction of the forum for the victim's centre of interests finds legitimacy in a close connection between the forum and the litigation. The publication lacks objective and verifiable elements to identify the victim as an individual. The jurisdiction of the forum and the content of the publication is interesting for the public of the state that finds space the victim's centre of interests.

Cumulation of damages and injunctive action

Art. 7, no. 2 of the Brussels I-bis Regulation on defamation via Internet is highlighted in the Gtflix Tv case.[87] A company that produces adult audiovisual company and sited in the Cech Republic gave formal notice to a Hungarian film director, who allegedly made derogatory comments about it on various websites, to remove them.

The company sought legal action for interim measures in France. Both the Court of first instance and the Court of Appeal

assumed that the defamatory publications at issue were of objective interest to the public of the state of the centre of interests of the victims, since they made express reference to the latter (...)".

86CJEU, Conclusions of the Advocate General Bobek, presented on 23 February 2021, in case C-800/19, Mittelbayerischer Verlag KG v. SM, op. cit., par. 40, 59, 88.

87CJEU, 21 December 2021, C-251/20, Gtflix Tv v. DR, ECLI:EU:C:2021:1036, published in the electronic reports of the cases.

in Lyon ruled they lacked jurisdiction on the base that it is not sufficient that the infringing comments were accessible within France. Subsequently, an appeal was filed in cassation requesting a preliminary ruling and clarifications based on Art. 7, n. 2 of the Brussels I-bis regulation as a cumulation of inhibitory and compensatory action for victims of online defamation.[88]

The CJEU based itself on the principles that we have already seen in the previous eDate and Ilsjan cases. Specifically, the court based itself on the position that the victim of online defamation brings an action seeking both inhibitory and compensatory protection simultaneously, excluding the existence of an exclusive jurisdiction for cumulative action by the judge in the place of establishment of the subject, who has issued defamatory content.

The compensatory and inhibitory action is brought with facts that are distinct in object making joint treatment necessary. The assertion of exclusive jurisdiction for appeals of this type has render indispensable the principle of good administration of justice.

Art. 7, n. 2 of the Brussels I-bis regulation has a transnational character. This means, that the judge decides on the claim for damages based only on its national territory with the purpose of

88CJEU, 21 December 2021, C-251/20, Gtflix Tv v. DR, op. cit., parr. 11-19 and 22-33.

provoking the removal of the relevant defamatory content.[89]

The CJEU has highlighted the accessibility of the damaging content in the territory of a Member State. It is sufficient for the jurisdiction of the judges of this Member State and within the limits that are necessary to ascertain such a defamatory content addressed to the public of the same state.[90]

This judicial position confirms the established principles marking the ubiquitous principle through a recognition in favor of the victim of online defamation as well as the ability to bring the action for damages before the judges of the various Member States. In this way, the judges are in the position to assess the damage verified in their respective national territory.[91]

The CJEU has affirmed the jurisdiction for the proceedings as the only eventuality for the victim, who uses the forum due to his impossibility of identifying the place of the harmful event[92].

The conclusions of the Advocate General Hogan are in favour of a conservation of the relative mosaic approach,[93] which entails

89CJEU, 21 December 2021, C-251/20, Gtflix Tv v. DR, op. cit., par. 43.

90CJEU, 21 December 2021, C-251/20, Gtflix Tv v. DR,, op. cit., par. 41-42: "(...) the adoption of the requirement of addressing the publication, in addition to that of accessibility, must be excluded since this requirement should have been expressly provided for by the law, in the same way as that provided for by art. 17, paragraph 1, letter c), of the Brussels I-bis Regulation, which, for the purposes of determining the competent court in matters of contracts with consumers, attributes relevance to the addressing of the professional's activities towards a specific Member State (...)".

91CJEU, 21 December 2021, C-251/20, Gtflix Tv v. DR, op. cit., par. 38.

92CJEU, 21 December 2021, C-251/20, Gtflix Tv v. DR, op. cit., par. 39.

93CJEU, Conclusions of the Advocate General Hogan, presented on 16 September 2021 in case: C-251/20, Gtflix Tv .v DR, op. cit., parr. 60-63: "(...) the abandonment of the mosaic approach was not justified by the need to counter the

the criterion of destination.[94] The Advocate General affirmed, in this regard:

"(...) the criterion of accessibility of the defamatory publication with that of the addressing of the same towards a specific Member State (...) the defamatory publication was specifically intended would be equipped with limited competence (...) to know the damages materialised in their national territory (...)".[95]

In the end, the CJEU did not follow the line of the conclusions of the Advocate General but remained faithful to the relative criterion of accessibility.[96]

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multiplication of competent courts that it entails (...) there are no coordination problems between the various proceedings instituted in these courts, since each of these proceedings has a different petitum (a different portion of damage) and a different causa petendi (a different law on which the action is based) (...) the Mosaiktheorie should not have been opposed even on the basis of the fact that it can facilitate the victim of defamation's recourse to vexatious judicial strategies, aimed solely at putting the defendant in difficulty (...) it should be opposed with other instruments, such as the adoption by the various Member States of regulations on litigation costs suitable for discouraging the initiation of frivolous litigation (...)".

94 CJEU, Conclusions of the Advocate General Hogan, presented on 16 September 2021 in case: C-251/20, Gtflix Tv .v DR, op. cit., par. 82.

95 CJEU, Conclusions of the Advocate General Hogan, presented on 16 September 2021 in case: C-251/20, Gtflix Tv .v DR, op. cit.,par. 88.

96 CJEU, 21 December 2021, C-251/20, Gtflix Tv v. DR, op. cit., parr. 41-42: "(...) it was not the right occasion for the Court to take a position in the sense of maintaining or abandoning the mosaic approach, since the preliminary question did not concern a case of violation of personality rights (...) The appellant company, in fact, based its request on the provisions of French law on unfair competition (...) in this case jurisdiction should be determined not so much by applying the principles established by the Court of Justice in the matter of defamation, but rather in the light of the principles affirmed by the Court in the matter of unfair competition (...)". CJEU, 29 July 2019, C-451/2018, Tibor-Trans Fuvarozó és Kereskedelmi Kft. v. DAF TRUCKS N.V., ECLI:EU:C:2019:635, par. 33. CJEU, Conclusions of the Advocate General Hogan, presented on 16 September 2021 in case: C-251/20, Gtflix Tv.v DR, op. cit., parr. 95-105: "(...) Art. 7, no. 2 of the Brussels I-bis Regulation, as the court of the place where the damage occurred, the judicial authority of the Member State whose market was affected by the anti-competitive conduct) (...) in the case at issue in the referral, the jurisdiction of the French court should be affirmed if it is demonstrated that Gtflix Tv has a significant number of French customers (...) on websites accessible in France, denigrating phrases by the defendant (...)".

What is the law of application for obligations relating to violations of personality rights?

When speaking of the law of application for violations of personality rights, we refer to the Rome II Regulation, as well as to a related exclusion process. In this regard, Regulation no. 864/2007[97] has divided the harmony in the field of civil judicial cooperation, excluding, therefore, the field of application, which according to Art. 1, par. 1, letter g)

"(...) non-contractual obligations arising from violations of private life and personality rights, including defamation (...)".

This is a process that leads to the choice a path entailing its main features (Dickinson, 2008). A process that since 2002, through the non-contractual obligations that arose from the violation of personality rights and defamation, provides, through art. 7, that the law is applicable to the country in which the victim habitually lives at the time of the offence (Warshaw, 2006).

The European Commission opted for an extension of the non contractual obligations. This proposal, according to art. 3, is based on the criterion of locus damni which is contrary to the law that respects the fundamental principles of the forum in terms of freedom of expression and information, which finds application the lex fori.[98]

97Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), in OJ L 199, 31.7.2007, pp. 40–49.

98Proposal for a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ('Rome II'), COM/2003/0427 final - COD 2003/0168, 22 July 2003, art. 6, par. 1.

In particular, art. 3 included a general rule, that is later confirmed in a definitive text for the regulation that provided for the application of the law specifying the place of origin of the damage and the place verified the indirect consequences except the application of the law of the country of habitual residence that is the same with the parties of the damage. Such a special rule for the right of reply and for the equivalent measures provides for the application of the law of the country of habitual residence of the broadcasting body and of the publisher of the newspaper.[99]

The European Commission has ensured consistency between the applicable law rule and the jurisdiction that the CJEU has affirmed the Shevill case. The lex loci damni as a criterion linked with the principles established in the Shevill case has led to some results, namely that the victim has chosen to go to the judge of a state that the publication was distributed. This judge is competent to know the damage that occurs in its territory.

The application of its own law pronounces on the damage suffered the victim. Thus, the judge of the publisher's seat is competent to know the damages suffered by the victim. This judge makes distributive application for the laws of the states that the victim has suffered his damages.

The basis of the application of the general conflict rule as a

99Proposal for a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ('Rome II'), op. cit., art. 6, par. 2.

response to publishers is found to the laws of special clause of public order intended to contradict the lex loci damni, as well as the fundamental principles of the forum, in the field of freedom of expression and information (Nagy, 2012).

Therefore, the European Commission has based its decision on the opposition of representatives of newspaper publishers, as well as in general to the mass media, which invoke a conflict rule based on the country of origin criterion (Kuipers, 2011; Nagy, 2012; Cedeño Hernán, 2021).

The European Parliament has found the solution for the media, approving an amendment to a provision that is formulated by the European Commission. It replaces the reference to a general conflict rule and the provision that apply to the law of the state where the elements for damage are located.[100] The amended provision specifies that violations caused by means of the press and broadcasts coincide with the state that publications and broadcasts are addressed even in a non-evident manner, however, exercising editorial control.[101]

This rule also applies analogously to online publications, as well as to electronic networks.[102] The European Commission, through

100 European Parliament legislative resolution on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ('Rome II'), COM/2003/0427-C5-0338/2003-COD 2003/0168, 27 June 2005.

101 European Parliament legislative resolution on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ('Rome II'), op. cit., art. 5, par. 1.

102 European Parliament legislative resolution on the proposal for a regulation of

the proposal for the amendment of the regulation, rejects the amendment of the European Parliament. It was found to be excessive and in favour of publishers. It concluded that the regulation of offences committed, through the press and other media, provides for the application of a general conflict rule relating to violations of personality rights.[103]

It is a compromise solution accepted by the Council. It considers the exclusion for violations of personality rights in the scope of the Rome II regulation as the only possible solution to overcome the difficulties during the preparatory works[104].

It is understood that the obligations arising from the violation of private life for personality rights take into account the rules in force for various Member States in the field of freedom of the press, as an expression of the media, as well as the protection of private life and the processing of personal data.[105]

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the European Parliament and of the Council on the law applicable to non-contractual obligations ('Rome II'), op. cit., art. 5, par. 1, 2 and 3.

103 Amended proposal for a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II"), submitted by the Commission pursuant to Article 250(2) of the EC Treaty, COM/2006/0083 final-COD 2003/0168, 21 February 2006.

104 Common Position No 22/2006 with a view to the adoption of a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II"), adopted by the Council on 25 September 2006, in OJ C 289 E, pp. 68

105 Agreement on the regulation on the law applicable to non-contractual obligations ("Rome II"), of the Parliament-Council Conciliation Committee, C/07/111, 16 May 2007.

What are the reasons for the exclusion?

The exclusion from obligations arising from violation of personality rights within the scope of the regulation Rome II specifies that the case states the difficulties and the elaboration of a compromise rule between proposed options as well as the two approaches of the lex loci damni and the law of the country of origin of the publisher.

The conflict rule is contrary to the mass media due to the fact that the criterion of designating a plurality of laws to the same case is connected with defamation by means of the press and another channel of communication. Such a solution imposes on the media the heavy burden of defamation (Nagy, 2012).

In particular, the representatives of the United Kingdom who are against the conflict rule relating to the criterion of lex loci damni, consider as unacceptable to judging before the judges of the state that the foreign law of the state verifies its own damage.

The British Parliament has excluded the scope of the defamation act. The scope of the new defamation act maintains the rule of the common law and the double actionability rule based on the cumulative application of the lex loci commissi delicti and the lex fori. This is a system that leads to the application of the lex loci damni alone.

The country of origin for publishers is invoked and taken into

consideration by the European institutions in relation to the proposals of the uniform conflict rule. The conflict rule is based on the criterion that characterize the criterion of the lex loci commisi delicti as a law close to the tort case for the victim.

The need to respect the cardinal principles according to the conflict rules in torts and the demands of the media are strong for the lobbies and in relevance for the interests that are bearers of satisfying even momentarily a conflict rule that paralyze the work and excessively delay the issuance of the regulation Rome II.

This approach is based on Art. 1, par. 2, letter g), of the regulation with an extended way for the violation of private life and personality rights including defamation as a formula that includes every type of injury to the human person. The legal category that is used in the legal systems of the Member States defines this type of injury (Dickinson, 2008).

The civil law legal systems include the category for personality rights, that are part of subjective legal situations that characterize in an absolute way the patrimonial, essentiality, unavailability and imprescriptibility. In the English legal system, confidentiality is the object of a specific right, that is protected by law and by a plurality of common law remedies.

Differentiating the subjective profile of the victim has as a consequence and refers to the violations of damages of natural

persons, that are committed to the detriment of legal persons and to the violations of their commercial reputation. The only exception is infringements of business secrets of a company competing with the victim, which fall outside the scope of Art. 6, par. 2 of the Regulation (Thunken, 2012).

The exclusion refers to violations committed within the scope of processing for personal data (Liakopoulos, 2019b).[106] The conflict rule proposed by the European Parliament regulates the applicable law for violations committed in the processing of data by identifying the country of habitual residence for the publisher and the broadcasting body. The review clause, according to Art. 30 of the regulation, states the:

"(...) protection of natural persons with regard to the processing of personal data and on the free movement of such data (...) this clause is aimed at introducing a harmonized conflict rule to fill the gap left by Art. 1, par. 2, letter g) (…)".[107]

Positions of the European institutions and conflict rule

Art. 30, par. 2, of the Rome II Regulation[108] deals with a comparative framework for the internal discipline of the Member States, for the substantive law on violations of

106 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, in OJEU L 119, 4.5.2016, pp. 1–88.

107 Art. 30, par. 2 of the regulation Rome II.

108 Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, JLS/2007/C4/028, Final Report (c.d. Mainstrat study).

personality rights, highlighting the differences between the various legal systems.

The iter followed by the Regulation Rome II did not introduce a harmonized conflict rule for the matter under investigation. It did, however, state in the same report a remedy of a negative impact for the differences of various legal systems for the Member States that have established a European common market within the area of security, justice and freedom.[109]

The Regulation Rome II seeked to develop a harmonized conflict rule based on the certainty and predictability of the applicable law within the measure that eliminates the burden for the parties connected with facts and with the related reduction of the costs in litigation. It was difficult to identify the connecting factor that tried to balance the interests at stake.

The harmonization for the substantive legislations of the Member States, through the introduction of common principles in the field of personality rights, are set by a directive (Liakopoulos, 2019a). This instrument did not avoid the adoption of the harmonized conflict rule facilitating, in such a way, its introduction. Harmonization for substantive legislation facilitates and achieves a consensus for the introduction of th Regulation Rome II, as a conflict rule that is based on the

109Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, op. cit, pag. 141.

connecting factor of locus damni.[110]

Already in the working document of 2010, dedicated to the modification of the Regulation Rome II, a conflict rule was introduced in the matter of violation of personality rights.[111]

The main problem of this approach was based on the conflict rule, that proposed a solution based on a law of the private international law of the Union in Romania. This conflict rule about the injuries of personality rights is caused by the mass media. It attributes to the injured party and to the application of the law of the state that is at his domicile and his residence as that of the state in which harmful consequences of the tort occur, i.e. the state in which the author of the damage has his domicile, headquarters and/or residence.

The European Commission has represented this position as a model starting from the elaboration of a uniform conflict rule, that allocates and regulates the hypotheses of defamation through the mass media to a fair degree of flexibility. This is a mechanism of choice between laws connected to the dispute. This mechanism is suitable to ensure the balancing of game interests, as a predictability clause for the law applicable by the author of the illicit act. The parliamentary commission

110 Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, op. cit, par. 150.

111 Working Document on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), European Parliament Legal Affairs Committee, 23 June 2010, Rapporteur Diana Wallis.

underlines and specifies the elements through this type of predictability taking into consideration the communication tool in the language used and the publications made in the state in question.[112]

By amending the Regulation Rome II[113] the conflict rule in a comprehensive manner and as the subject of the resolution of the parliament differentiated the clause excluding the application of the law of the country. In such away are placed elements for the loss of damage and in favor of the law of the country of habitual residence which is responsible, providing for in such a way the applicability of the first law.[114]

112Working Document on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), op. cit, pag. 10. The Mainstrat Study aims to harmonize, by means of a directive, the internal regulations of the various Member States that are connected with the rights of personality. This type of harmonization is also part of the Legal Affairs Commission that does not consider it necessary to implement the conflict rule that seeks to balance interests for the parties as a result that accepts the use of the criterion of connection within the place of establishment of the publisher. The Commission thus suggests that in various Member States the bodies try to monitor the balance for freedom and privacy for the rights of personality.

113Resolution of the European Parliament of 10 May 2012 with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), (2009/2170 INI), 10 May 2012. an amendment which also concerned conflict rules in the area of personality rights, as well as the resolution requesting the Commission to submit a proposal for the establishment of a voluntary resolution centre for cross-border disputes in the area under investigation. The aim was to create a system for resolving disputes concerning violations of personality rights in order to ensure access to justice, reduction of litigation costs, proper functioning of the national market, as well as a balance for the interests of disputes which are evolving towards a justice system oriented towards new forms of mediation.

114Resolution of the European Parliament of 10 May 2012 with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), op. cit., art. 5-bis, par. 2. in reality the relevant provision is specified for the application of the law of the country in which the defendant habitually resides and which has not foreseen

A reduction of the constitutional norms of the forum in the field of freedom of the press and expression in the media is considered contrary to public order for the state of the judge seized.[115] This solution did not follow the initiative of the Commission which according to Regualtion Rome II excluded the scope of application of Art. 1, par. 2, letter g):

"(...) extra-contractual obligations arising from violations of private life and personality rights, including defamation (...)".

(Follows). General conflict rules

The special conflict rules for obligations arising from the violation of personality rights and the general conflict rules in matters of extra-contractual obligations present the connecting criterion with the lex loci commissi delicti and with other criteria such as residence and common nationality of the parties.

In Germany, in cases of violation of personal rights, the conflict of laws rule is applied, according to Art. 40EGBGB. This provision is applied to obligations arising from a tort of the country, which is carried out the harmful conduct for the victim, who requests the application of the law of the country in which the violation of his rights is verified.

The tortfeasor and the injured party habitually reside in the state,

other substantial consequences for the act committed in the country as well as the element that is connected with the loss of damage are verified.

115 Resolution of the European Parliament of 10 May 2012 with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), op. cit.

which at the time of the tort applies Art. 40, par. 2. The exception clause contains the law, which excludes in favor of a state, which the tort has the close connection. Obligations arising from violations of personal rights are the basis for the general conflict of laws rule in the area of non-contractual obligations, which alternatively calls the law in the place in which the harmful event occurs.

The remote tort is based on the fact that the harmful event does not coincide with the state that manifested the damage. The conflict rules structure in an inadequate and regular way the defamation via internet for the damage that is based on a considerable number of states and the foreseeability of the applicable law is reduced.

In cases of defamation, the conflict rules, through the attribution for the choice of the applicable law by the victim, risk penalizing the publishers, authors of the illicit act, prejudicing that the interest of the bearers has to do with freedom of information and expression. Thus, the victim puts the defendant in difficulty, as the author of the illicit act through the option in favor of the law of the place where the damage occurred. In this case, a plurality of laws are regulated that are applied with difficulty and foreseen by the defendant.

The inadequacy of the conflict rule often in national law needs to be modified. It needs to foresee with applied way extra-

contractual obligations for the violation of private life and personality rights for the state of common residence for the interested parties. In the case of lack of appropriate law in victim's state for damages suffered it is applied the law of the state that is responsible for the damage.

The conflict of laws in the tort sector follows a ubiquitous approach. They are based on the connecting criterion of the place where the event generating the damage occurs. The conflict of law rules are in force in Greece, Spain and Austria. In particular, Art. 26 of the Greek Civil Code and Art. 10.9 of Chapter IV of the Spanish Civil Code provide for extra-contractual obligations in tort only where the harmful conduct is committed.[116] For example, the Spanish conflict of law rule is subject to interpretation relating to remote torts. In this case, the ubiquity theory for the victim chooses the law of the country where the harmful conduct occurred.

The conflict of laws, according to Art. 4 of the Rome II Regulation, is applicable when a damage occurred regardless of the place. The Spanish system shows that the precision of the place that verifies the damage in defamation cases has a transnational character. This criterion leads to the relative recall of a plurality of laws and proceeds to a distributive application of the same according to the mosaic principle.

116Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, op. cit, pp. 80-81.

It is noted Art. 48 on international private law in Germania (the so called IPRG) which states the application of the law to the state that carries out the behavior that caused the damage in the absence of an electio legis by the parties and in the absence of a precise, rigorous connection with the law of another country.[117]

In France a general rule of private international law is applied. That is, Art. 3 of the France Civil Code[118] concerning trans-border torts based on the law of the country that the fact caused the relative damage.[119]

Transnational defamation follows a solution that does not guarantee the application of a single law but only a distributive application of various laws of the states that the defamatory publication is spread, for the victim who has suffered damage to his or her reputation.

Since 2022 a working group has presented a code of private international law containing innovations in terms of the law applicable in the cases under consideration.[120]

Art. 94 of this project provides that extra-contractual obligations

117 Austrian Act on Private International Law of 15 June 1978, in the Austrian Official Gazette (BGBI), No. 304/1978, Art. 48.

118 Which is affirmed that: "(l)es lois de police et de sûreté obligent tous ceux qui habitent le territoire. Les immeubles, même ceux possédés par des étrangers, sont régis par la loi française. Les lois concernant l'état et la capacité des personnes régissent les Français, même résidant en pays étrangère (...)".

119 Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, op. cit, pp. 85ss.

120 See for example: "Projet de code de droit international privé": https://www.justice.gouv.fr/sites/default/files/migrations/textes/art_pix/rapport_code_DIP_mars_2022%20.pdf Accessed on 10.09.2025.

are applied to the law that calls the conflict rules (Regulation (EU) n. 864/2007). Art. 95, par. 2 establishes the violation of personality rights and defamation that applies the law of the state that is in the center of the interests of the victim. In particular, art. 95, par. 1 contains a conflict rule that is applicable for unlawful acts committed, through the mass media and with the exception of violations of personality rights and defamation thus providing for the distributive application in the laws of the states that the alleged has oriented and directed his activity.

(Follows). Special conflict rules

The criterion of lex loci commissi delicti is based on general conflict rules and obligations, that are not contractual and present difficulties in application concerning illicit acts of an intangible asset. In this way the injury is not easy to locate a precise space. Such localization through the distribution of the publication and access to the internet page of the defamatory content has as a consequence, that the connecting criterion ends and recalls a multitude of laws. This situation of uncertainty and lack of predictability for the applicable law risks harming interests such as those of freedom of the press and information.

The Code of Private International Law of Belgium in Art. 99, par. 2 provides that extra-contractual obligations arising from

defamation and the violation of private life. They find application at the law of the country that the unlawful act is verified, unless the author of the unlawful act is not foreseen in such a state. The foreseeability by the author is based on the criterion of locus damni. It has as its objective to guarantee a balance for the interests of the parties as well as the protection of privacy and freedom and information.

The conflict of laws in Romanian private international law has chosen to apply, in this regard, the Legal Committee of the European Parliament, namely the amendment of Regulation Rome II as well as the relative rule in force in Bulgaria. Already Art. 108 of the Private International Code of Bulgaria established that extra-contractual obligations arising from violations of personality rights, through mass media, are regulated at the choice of the injured party, based on the state that finds a habitual residence as that of the country where the damage occurred and the country of habitual residence and place of business of the perpetrator of the tort. Thus, the victim chooses the laws that find application for the perpetrator of the tort and the damage that occurred in the territory of the respective states, according to art. 108, par. 4.

Article 101 of the Czech Private International Law Act has highlighted non-contractual obligations for violations of privacy and personality rights. It also includes defamation and the

application of the law of the state in which the violation is verified except that the victim is oriented towards the application of the law of the state in which the habitual residence is located, the registered office of the perpetrator for the tort and the law of the state in which the consequences of the tort are verified. This is a choice for the victim that falls to the law and which is applied only if the perpetrator of the violation foresees the consequences, that may occur on the territory of the state in question.

A general conflict rule in torts often appears as a special rule on the law that applies to personal rights in Lithuania. It is worth mentioning Art. 1.45 of the Civil Code of the Republic of Lithuania, which refers to disputes in the matter of compensation for damages due to violation of rights, which are not patrimonial but are regulated after the victim's choice by the law of the country in which the perpetrator of the damage is domiciled and/or has his/her place of business. This is a provision that does not include the foreseeability clause in favor of the perpetrator of the injury, thus providing a disproportionate advantage to the victim.

Hungary, even before the 2017 law on private international law, had special conflict rules for violations of personality rights. It is recalled Art. 10 of the Decree-Law No. 13/1979 on private international law of violations, which applied the law of the state

where the wrongful act occurred. Therefore, this law is not favorable to the victim.

The new regulation does not refer to this old position, as a consequence for the cases under consideration, that are part of the general conflict rule in matters of non-contractual obligations, according to Art. 28 of the new law.[121]

This is a provision that provides the law applicable to non-contractual obligations for the country that caused the damage. Thus, the application of the law regulates any legal relationship that exists between the parties at the time of the wrongful act. It is allowed that the parties choose the applicable law and the choice is verified for the wrongful act through a judgment and within the deadline set for the judge.

What happens with the "double actionability rule" that applies to common law countries?

A particular and precise conflict rule, that was introduced in the 19th century by English courts, establishes the application of actions before judges. It is the double actionability rule. This is a rule relating to torts that are committed abroad.

A rule that applies to the lex fori and to the lex fori delicti. It provides that the judges of the United Kingdom accept a direct claim for compensation for damages for act/s committed abroad and when the act constitutes a tort by the law of the forum in the

121Law XXVIII of 11 April 2017 on private international law, art. 28.

country where the act was committed (Hartley, 2010; Mills, 2015).[122]

In other words, it is an action for an alleged tort committed in a foreign jurisdiction. It can be successful judged in a domestic court only if it would be actionable under both the laws of the home jurisdiction and the foreign jurisdiction. This is a rule with exceptions from British case law, especially with regard to the lex fori in cases where the offence is not committed abroad and involves British citizens.

The case law exceptions relating to the double actionability rule found space in the opening of foreign legal systems, that lead to the overcoming of the adoption of the old private international law act (PILA) of 1995.

This is an act that has its main source in the private international law of the United Kingdom, that introduced the conflict rule in matters of torts based on the criterion of locus commissi delicti, thus accompanying the exception clause that makes applicable the law that is appropriate for the case according to the peculiarities of a specific case.

The PILA of 1995 excludes the scope of application for actions for damages for defamation in relation to actions that the judges of the United Kingdom place to the common law conflict rule of

122See: Philips v. Eyre of the Queen's Bench Division (Phillips v. Eyre (1870) LR 6 QB 1): https://vlex.co.uk/vid/philips-v-eyre-805743265 Accessed on 10.09.2025.

the double actionability rule.[123]

The reasons for the exclusion have to do with the desire to raise defamation in public for the interests that involve the phenomenon of the opening of foreign legal systems pursued with the reform of 1995 and with the reduction of the use of the criterion of lex fori.

The double actionability rule highlights the protection of the English media as well as the interest of freedom of information. They are bearers to the extent that they are called to answer for defamation based on a foreign law for a fact that is not unlawful in their own law (Mills, 2015).

The double actionability rule allows the media to take advantage of the legislation, that is favorable in the field of freedom of expression, which respects the English one as well as that of the US.

The editor of a newspaper in the United Kingdom is sued before the English judges, who has published in the US an article of a defamatory nature. This article is not considered defamatory under American law but by English judges, who sentence the

123See for example section 13 of the PILA of 1995 that is affirmed that: "(...) (1)Nothing in this Part applies to affect the determination of issues arising in any defamation claim (2)For the purposes of this section "defamation claim" means- (a)any claim under the law of any part of the United Kingdom for libel or slander or for slander of title, slander of goods or other malicious falsehood and any claim under the law of Scotland for verbal injury; and (b)any claim under the law of any other country corresponding to or otherwise in the nature of a claim mentioned in paragraph (a) above (...)". The relative exclusion is strict according to art. 1, par. 2, letter g) of the Rome II regulation and refers to defamation and not to violations of personality rights.

publisher and the article which constitutes defamation under English law system.

The conflict work under examination of the English jurisprudence finds space in various sentences and is also applied in cases of online defamation (Mills, 2015).[124] In these cases the rule finds its main criticality and leads to an excessive application in relation to cases that have little connection with it (Mills, 2015).

The effective principle of the over-application of the British system has amplified to the tendency of the British judgments, which affirm the jurisdiction for cases of online defamation and in application of the titles of jurisdiction, that are foreseen by the national law and by virtue of those that are foreseen by the Regulation Brussels I-bis.

The British judges know causes of defamation via internet and have few connections with the United Kingdom, that is with few users of the country that have viewed contents of a defamatory nature, in this regard. This conflict rule is applied by the British judges in a way that is favorable for the victims of defamation.

124See the case from England and Wales High Court (Queen's Bench Division), 6 March 2015, The Bussey Law Firm PC v. Page, [2015] EWHC 563 (QB): "(...) a claimant seeking a remedy in this jurisdiction regarding a defamatory publication anywhere abroad must plead, and if necessary prove, that the words in question are actionable under the lex loci delicti as well as under English law". In the same argument see also: Godfrey v. Demon Internet Ltd (Application to Strike Out) [2001] QB 201, 23 April 1999, Loutchansky v. Times Newspapers Ltd (No 2) [2002] EMLR 241, of 5 December 2001. English judges have considered that the locus commissi delicti for online defamation lies where the relevant material has been downloaded by its users.

Malta, Cyprus, Ireland are countries, that are part of the double actionability rule as a rule applied to their jurisprudence. As can be seen from the Irish Supreme Court the abandonment of such a rule in favor of a flexible conflict rule leads to the selection of the appropriate law considering also the socio-economic consequences of the offence.[125]

The country of origin according to the E-Commerce Directive, Digital Services Regulation and infringements by information society service providers

It was the E-Commerce Directive 2000/31/EU which referred to the country of origin and to the related issues for the foreseeability of the applicable law for infringements of personality rights, which create the space for the formation of a uniform conflict of laws rule at European level.

The common rules for the Member States which seek to regulate aspects for information society services and e-commerce create a legal framework, which ensures the freedom of movement for such services.[126]

Such rules, also, ensure the proper functioning of the national

125 Supreme Court of Ireland, Grehan v. Medical Incorporated and Pine Valley Associates [1986] IR 528: https://ie.vlex.com/vid/grehan-v-medical-incorporated-793391525 Accessed on 10.09.2025.

126 See Art. 1, par. 2, of Directive 98/48/EC (Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, in OJ L 217, 5.8.1998, pp. 18–26), referred to in the E-Commerce Directive.

market which online news services, newspapers and web magazines are part of as well as the interference for the regulation of a directive and the issues which are part thereof.[127]

Art. 3 of the Directive refers to the country of origin principle. It provides that each Member State shall provide and respect national provisions in the field of the subject matter of its Directive by providers of information society services. Member States shall not restrict the circulation of services originating from other Member States except under specific conditions that are indicated by their own provision (Fallon, Meeusen, 2002). Member States shall adopt measures restricting the circulation of services originating from Member States to the extent, that such measures are necessary for the protection of public order, public health, public safety and consumers.

The measures adopt Art. 3, par. 4 of the Directive. The provision is a general expression of a general principle, that is based on the mutual recognition of goods and services in the EU. Thus, it imposes on each Member State the relative application for services and goods provided on its territory by subjects, that are established in another Member State.

The basis of presumption of equivalence for the guarantee offered by the regulations for the countries of the Union refers to the quality and safety standards of products and services.

127 Recital n. 18 of the directive. CJEU, 11 September 2014, C-291/13, Sotiris Papasavvas v. O Fileleftheros Dimosia Etaireia Ltd and others, ECLI:EU:C:2014:2209, published in the electronic reports of the cases, par. 30.

Art. 1, par. 4 of the directive establishes that it is the same that not introduces additional rules of private international law. However, Art. 3 includes conflict rules, which impose the application of the law of the country of establishment for the worker, that finds space in the same directive (North, 2001). This is a position in continuous and evolving discussion on the matter (Hellner, 2004). Art. 3, nos. 1 and 2 of the directive presents itself as a provision of the private international law of the Union based on the method of a model that respects the traditional one. It identifies the applicable law through the connecting factor that is different from that of the state of establishment of the service provider and that of the destination state.

The principle of the country of origin has immediate application. It imposes the application of a substantive law to a state that the subjects established in their territory intend to provide their services abroad. This is a starting point with the conflict of laws and with the laws referred to.

The state of destination of the service and the principle under consideration act as an exception to mutual recognition obliging in exceptional cases and according to art. 3, par. 4 the authorities of the state to apply the law of the country of establishment for the provider of the service in the designated place reaching a result favorable to him. This is similar with the exception of

public order clause, which works within the conflict rules taken into account. The results differ according to the measure that the law of the country of origin of the provider of the service is applied.

The discussion was addressed by the CJEU to questions arising from the eDate case.[128] It is the referring court that asked the CJEU according to numbers 1, 2 and 3 of Directive 2000/31/EC to qualify conflict rules that make the law of the country of origin exclusively applicable to the service provider in place of the national conflict rules, which also intend as a suitable corrective to modify the content of the law.

Art. 3, par. 1 of the Directive did not include a rule of private international law, i.e. a law applicable for the country of establishment in the service providers. Nor did Art. 3, no. 2 require Member States to have a conflict rule in this sense. The provisions, thus, pursue objectives concerning the national market, i.e. mandatory rules that ensure their application by the national legislator. It is, also, prohibited that the provider of an electronic commerce service in the host country rigidly prescribe those that are provided for by its own country of establishment except for derogations.

According to Art. 3, no. 4. for the CJEU the statements are contrary to each other. Furthermore, the provisions, according to

128CJEU, 25 October 2011 in joined cases: C-509/09 and C-161/2010, eDate, op. cit., parr. 53-68.

Art. 3, nos. 1 and 2 of the Directive, impact with the international law, that is provided by the Member States by forcing to apply the law of the country of origin in the service provider, that is favorable and respects the rules of an applicable conflict. It is not excluded that the provisions in question are true for the conflict rules by presenting in a precise manner the provisions, that are independent and secondary as well as corrective in function, respecting the conflict rules applicable from time to time.

The Court's statements are understood, according to art. 3, on the competence of the Member States that affect the directive as well as the necessary implementing provisions in order not to attribute provisions for the country of origin to the provider of IT services of a mandatory nature, which prevail in exceptional cases and on laws of the country of destination with stringent conditions for the provider.

The relevant provisions in a precise manner and according to Art. 2, letter i) of the directive affect the law, that is applied to sectors part of such rules, including the requirements relating to access to the activity, the qualifications and authorisations, that are requested for the performance and the exercise of its activities.

The provision specifies and includes the relevant regulations for services, contracts relating to the liability of the provider. They

refer to online information services for the principle of the country of origin, that affects the law that applies to the liability of the provider for violations of personality rights in the event of a provision of a service, thus imposing on various Member States the application of the law of the country of establishment for the provider under investigation.

In this way, the discrepancy between the rules of private international law for Member States in the matter of violations of personality rights that are applied to a uniform conflict rule guarantees a minimum level of harmonization for the resolution of the conflicts of laws in question.

Such a remedy seems to be insufficient, concerning the liability of the provider which refers to the country of origin including also the assessment of damage. The same scope of application finds space in the directive, which refers only to providers, who establish themselves in the Member States of the Union. This scope from the objective side concerns the services transmitted via web without applying to press, radio and television (Nagy, 2012).[129]

Different rules for information are inadequate due to the fact that the same subject spreads the information used in a contextual way to the internet, press, radio and television

129Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, in OJEU L 95, 15.04.2010, pp. 1-24.

channels. The influence of the e-commerce directive on international aspects remains unchanged after the adoption of the new regulation on digital services.[130]

It is a regulation that seeks to harmonize rules directed and applied to all states of the Union in relation to the provision of intermediary services within the national market. They are, thus, established rules for the conditional exemption of the liability of providers for services and due diligence obligations.

The implementing rules, therefore, include those pertaining to cooperation between competent authorities. The regulation seeks to harmonize the discipline on digital services for Member States that do not have a reason to establish the discipline for the principle of the country of origin and the service provider. Such a regulation in art. 2 concernes all providers even those that are established outside the territory of the Union and for intermediary services that in reality through natural and legal persons offer services to their territory.[131]

The liability for providers and the regulation are limited to establishing cases that are exempt from the liability of the provider thus referring to applicable rules within the law of the

130Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a single market for digital services and amending Directive 2000/31/EC (Digital Services Regulation), in OJ L 277, 27.10.2022, pp. 1–102.

131Art. 3, letter g), for intermediary services: "(...) means information society services, of mere conduit, temporary storage ('caching') or non-temporary storage of information ('hosting') (...)". See also Art. 1, paragraph 1, letter b), of Directive (EU) 2015/1535, which is the same as the definition that is part of the E-Commerce Directive.

Union or national laws.[132]

The aspects relating to liability are not regulated by the new regulation, which remains under the application of a rule that establishes, according to art. 3, the e-commerce directive based on the principle of the country of origin as the provider of the service.

Art. 2, par. 3 of the regulation leaves the application of Directive 2000/31/EC and the provision of recital no. 9 of the same regulation of not being able to adopt and maintain additional national provisions, that respect the content of the same regulation which states:

"(...) possibility of applying other national regulations applicable to intermediary service providers (...) including directive 2000/31/EC, in particular Article 3 (...) national provisions pursue legitimate objectives of public interest other than those pursued by the regulation (...)".

Member States establish liability for providers of services relating to the information society and to profiles not regulated in their own regulation, which apply the law of the country of origin for the providers. It is a favorable law that respects the national law as required by Art. 3 of the e-commerce directive.

132See recital n. 17 of the regulation (EU) n. 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a single market for digital services and amending Directive 2000/31/EC (Digital Services Regulation), op. cit.

Jurisdiction, applicable law and violations of personality rights. Problematic aspects and preferable solution. The case of the ubiquitous principle and the related competent courts

We recall the Bier case of 1976 and the subsequent jurisprudence that paved the way for the competent court of the tort to a single jurisdictional authority in the place where the harmful event occurred. An elastic interpretation is elaborated by the CJEU, that considers the provisions of the regulation providing for special courts in derogation and in respect of the general court of the defendant's domicile. These provisions are interpreted restrictively.[133]

The doubtful validity of the CJEU regarding the option on remote offences and according to the principles of proximity and good administration of justice, which impose jurisdiction on the judges of the Member State where the offence is committed, was immediately noted.[134]

The two courts are not comparable for the litigation costs, that the parties sustain and that they must face before the judge of the place of the relative conduct, which benefits the author of the offence. In such a way, the victim respects and is distant in the case of offences via web.

The case before the court of the place where the damage is

133CJEU, 16 July 2009, C-189/08, Zuid-Chemie, op. cit., par. 22. 8 May 2019, C-25/18, Kerr, ELCI:EU:C:2019:376, published in the electronic reports of the cases, parr. 21 and 22; CJEU, 17 June 2021, C-800/19, Mittelbayerischer Verlag KG v. SM, op. cit.. par. 26.

134CJEU, 30 November 1976, 21/76, Bier, op. cit., parr. 21-24.

based appears to be in favour of the victim and for reasons of proximity and in connection with their own interests, which do not disadvantage the author of the offence, who knows the place and the recipient of their publication, who suffers the relative damages. Thus, the title of jurisdiction of the place of the conduct of the illicit does not find room for the interpretation of art. 7, n. 2 of the regulation brussels I-bis.

Most of the cases are presented as a duplication of the general criterion regarding the domicile of the defendant. Its utility is found only in the hypotheses that seem rare because they generate the damage and do not realize the place where the author is domiciled.

From the civil offence arises the liability, that subordinates the performance of the conduct to a verification of the damage as well as the principle that the offence is without damage. This reasoning attributes to the jurisdiction of the judge a place that commits the act at the origin of the damage.[135]

The ubiquitous principle thus presents a contraindication of an applicative nature for the multiplication of the forums, that are components to hear the dispute. The disputes in matters of offences are taken into consideration according to the general forum of the domicile of the defendant of art. 4; the special

135CJEU, 30 November 1976, 21/76, Bier, op. cit., par. 9: "(...) the forum of the offence could not have been localised except where the perfection of the legal fact occurs, that is, where the damaging event occurs in the legal sphere of the passive subject (...)".

forum is provided for by art. 7, n. 3 relating to the jurisdiction to hear the action for compensation of damage and the restitutions of a criminal offence according to the head that the criminal action is directed; when there are many defendants the forum of the place that is domiciled is considered, according to art. 8, n. 18, facultative.

The provision of the forum of the tort in the ubiquitous principle adds forums that are competent for two other forums. First of all the place of the tort and the place that is specified its own damage. Thus it is guaranteed that the coincidence between ius and forum despite the divergence respects the solution, that is provided by a general conflict rule in the sector of extra-contractual obligations applicable in this regard.

Art. 4 of the regulation Rome II seeks the law of the country that occurs the damage independently of the country that occurs its own fact that gave rise to the damage.

The disputes concerning violation of personality rights as well as the multiplication for the forums become important for the principles established through the Shevill and eDate cases. The title of jurisdiction of the place where the damage is realized is suitable to attribute its competence to a plurality of jurisdictional authorities, as in the cases of defamation through press for the judges of the various Member States.

In the cases of defamation through internet the judges of all the

Member States have access to the harmful content as well as the judge of the place where the victim has the center of his interests.

This hypothesis of accessibility for the norm to internet sites possess and affirm the title of jurisdiction under examination, which confers the competence to the judges of all the Member States. Thus, the range of forums that are competent places for the plaintiff a position of strong advantage and for the defendant an extreme disadvantage.

The study of the cases tends to present as a given the hypothesis of the cause that is introduced in the injured party against the author of the illicit act. But many times the opposite happens. The author of the publication anticipates the injured party thus agreeing to the judgment the negative finding for the illicit act paralyzing every initiative.

The possibility of starting the dispute, within the convenient forum, coincides with the judicial authority in the place where one resides, thus representing the solution that contains the costs for the dispute.

The subject who intends to take legal action has no need to contain costs. It is a phenomenon of the forum shopping in the sector of defamation. It defines the libel tourim and the position of the defendant, that is penalized by the competent judges.

The interpretation of the provision on the forum of the tort with

reference to the hypothesis of defamation has a transnational nature, which is carried out at the CJEU to give light to the principle of ubiquity as one of the basic principles of the Brussels Regulation I-bis, that is, the predictability of the competent judge and of the defendant.

The criticisms related to the mosaic approach

The criticisms and problems related to the mosaic approach pay particular attention to the identification of a jurisdictional competence regarding the violation of personality rights of a transnational nature, a competence that is adopted for the first time through the Shevill case.

The practical nature highlights that the mosaic approach does not appear to be advantageous for the plaintiff and for the defendant. Thus, it is difficult to have an interest in acting before the various judges, who are competent and know the damages manifested.[136]

For the defendant the Mosaic approach is disadvantageous because it implies a risk connected with a plurality of judgments that are instituted before the judicial authorities of different Member States with consequent multiplication of the procedural costs.

136See the conclusions of the Advocate General in case: Gtflix Tv, op. cit., par. 82: "(...) the plaintiff may have an interest in taking action before a court other than that of the centre of his interests, even if it has limited jurisdiction, for example when it is a court of the state in which he is trying to expand his commercial activity (...)".

The distribution of jurisdiction based on the mosaic principle has nothing to do with benefits in terms of procedural economy and good administration for justice. Adversely, it raises other problems. The mosaic approach distinguishes the damages suffered by the victim of a state in other states, a job that does not always seem to be easy (Šrámek, 2015). Of course, the difficulty of distinguishing the damages suffered by the victim in various states is part of the hypotheses of defamation by means of Internet.

Defamation in press is distinguished and carried out contrary to newspaper and to magazine that distribute in various states the parameter of online defamation. The CJEU has affirmed and determined the place where the damage is materialized.

Several judges are competent for the basis of the Mosaic approach and are seized, thus posing the problem of the application of rules on lis pendens and on connection. According to art. 29 of the Brussels I-bis Regulation, the same parties that are pending in two cases have the same object and the same title before the jurisdictional authorities of different states that are seized.

This ascertainment is positive when the seized authority declares itself incompetent. Art. 30 of the regulation provides that the cases pending between the same parties before the judges of different states are connected with the judicial authority, that

suspends the proceedings by resorting to conditions of art. 30 par. 2.[137]

In particular, par. 2 of art. 30 has provided that the judge of first level is competent to hear questions connected with the applicable law. It is recalled that the notions of lis pendens and connection, according to art. 29 and 34 of the regulation Brussels I-bis, reconstruct in an autonomous way the respect of Member States' national legal systems. It is not specified whether the notion of lis pendens for the CJEU is specified with the concept of objective identity between the causes.

These conditions seek to satisfy the cases connected to the mosaic approach, that is, the pending cases founded on an unlawful act that has as its object the damages suffered by the victim in the territory of the state of the forum.

The Advocate General Darmon in the Shevill case excluded that the judges have concurrent jurisdiction and that the rules on lis pendens and connection cannot be applied, stating that[138]:

"(...) it is reasonable to doubt whether a lis pendens can be configured between the various cases brought according to the mosaic approach, there is no doubt that there is at least a connection between them (Màrton, 2016)[139]

137CJEU, 22 October 2015, C-523/14, Aannemingsbedrijf Aertssen and Aertssen Terrassements, ECLI:EU:C:2015:722, published in the electronic reports of the cases, par. 45.

138CJEU, Conclusions of the Advocate General Darmon, presented on 14 July 1994, in case C-68/93, Shevill, op. cit., parr. 97-98. CJEU, Conclusions of the Advocate General Hogan, presented on 16 September 2021 in case: C-251/20, Gtflix Tv.v DR, op. cit., par. 60.

139Marton affirms that: "(...) the various cases which are the subject of the "mosaic procedures" undoubtedly present two of the three prerequisites of lis pendens (...) the subjective identity of the parties and the identity of the title (since they all originate from the violation of the personality rights of the plaintiff by the defendant)

(...) he did not specify whether the judges of the Member States by virtue of the criterion of distribution/accessibility of the defamatory content have jurisdiction limited only to the aspect of the quantum of compensation for damages or also with respect to the aspect of the liability for the unlawful act (...) he did not clarify whether the decision of the aforementioned judges on the existence of the liability on the part of the defendant can or cannot be valid (in based on the principle of automatic recognition of judgments between Member States (...) outside the territory of the state in which those courts are located, binding the judicial authorities of other Member States which may subsequently be called upon to rule on the same offence (...)".

This argument also finds application in the verification of paradoxical situations, such as when the determination of liability is carried out by a judicial authority, who presents connections with the litigation thus binding the judges of all Member States, as well as the judge of the forum of the litigation to present a closer connection (Nagy, 2012).[140]

One solution would be to lead to the issuing of decisions, which are conflicting with each other and are devoid of effects for the state that issued the other (Bigos, 2005).[141]

(...) the requirement of objective identity, however, it is not possible to affirm with certainty that all the proceedings in question have the same object (...) the determination of the publisher's liability for the publication of the defamatory content (...) the court in the Shevill judgment did not specify whether the jurisdiction of the judges of the "mosaic procedures" is limited to the quantification of damages or can also be extended to the determination of the existence of liability (...)".

140 Nagy affirms that: "(...) the question under examination should be answered in the negative (i.e. the mosaic principle entails a limitation of jurisdiction not only on the quantum) (...) the example of a defamatory article contained in a newspaper distributed mainly in France (with 98,000 copies), and to a minimal extent in two other states (in Belgium, with 1,000 copies and in the United Kingdom, with another 1,000 copies) (...) the judge of each of those states can decide on the existence of the defendant's liability in relation to the unlawful act in question, with a judgment intended to bind the judges of all the other Member States, the determination of liability by the Belgian judge (...) would also bind the judge most closely connected to the dispute, namely the French judge (...)".

141 Conclusions of the Advocate General Jääskinen, presented on 19 April 2012, in case C-133/11, Folien Fischer, parr. 69-70 which is affirmed that: "(...) the rules on jurisdiction laid down by the Brussels I Regulation are to ensure that a single decision

In the Ilsjan case the CJEU highlighted that the mosaic approach has affirmed the inhibitory protection as an indivisible principle invoking the Shevill and eDate cases. In this case the judges have jurisdiction and know the damages suffered by the victim. The CJEU confirmed that the mosaic approach seeks to regulate the jurisdiction for damages compensation, for defamation of a transnational nature as can also be seen in the Gtflix Tv30 case.[142]

(Follows). Victim protection as a criterion based on the center of interests

Through the eDate case, the topic of the center of interests was introduced and addressed. In it, the regulation Bruxelles I-bis is not interpreted in a way that recognizes the jurisdiction of the forum actoris outside of the cases, that are expressly contemplated.[143]

Jurisdictional jurisdiction is based on the actor sequitur forum rei,[144] which is derogated in cases where the presence of a close

with international validity is granted for the same dispute and that the Shevill and eDate judgments do not conflict with this purpose (...) it has limited the jurisdiction of some judges in relation to certain cases but has not limited the effectiveness of the res judicata (…)".

142CJEU, 17 October 2017, C-194/16, Ilsjan, op. cit., parr. 45-49. See also the conclusions of the Advocate General in case: Mittelbayerischer Verlag, op. cit., parr. 33-35.

143CJEU, 11 January 1990, C-220/88, Dumez, op. cit., par. 19; CJEU, 19 September 1995, C-364/93, Marinari, op. cit., par. 13. 10 June 2004, C-168/02, Rudolf Kronhofer v. Marianne Maier and others, ECLI:EU:C:2004:364, I-06009, par. 20. CJEU, 16 January 2014, C-45/13, Kainz, op. cit., par. 32.

144The Jenard report on page 18 stated that: "(...) the provision of art. 2 of the 1968 Brussels Convention was based on the maxim "actor sequitur forum rei",

connection between the forum and the dispute is justified for reasons of protection of the weaker party.

The criterion of the center of interests for the victim does not find its foundation in the need to protect the subject who has suffered a violation of his/her personality rights through the publication of content on the Internet (Nagy, 2012).[145]

The CJEU has justified as an exception the rule of the actor sequitur forum rei for reasons of good administration of justice and foreseeability of the competent forum.[146] There are doubts about the fact that the competence of the identified forum is based on the criterion of the center of interests of the victim, which finds justification in various reasonings.

The criterion of the center of interests of the victim is not able to identify the forum connected with the dispute. It provides ex ante for the parties and gives relevance to the place, that the victim enjoys a reputation by leaving aside the verification of the object of the defamatory content in the public of the place, which takes into account the available language (Schmitz,

inspired by the favor iuris for the defendant (...) the distribution of jurisdiction between the various internal judges of a state usually occurs on the basis of this principle (...) someone who is sued before the judges of a foreign country needs greater protection than someone who is sued before the judges of another city in his own country (...)".

145CJEU, 17 October 2017, C-194/16, Ilsjan, op. cit., par. 38. Conclusions of the Advocate General Jääskinen, presented on 19 April 2012, in case C-133/11, Folien Fischer, op. cit., par. 46. The provision of the forum of tort, unlike sections 3 to 5 of the Brussels I-bis, does not pursue objectives for the protection of a weaker party in the relevant relationship.

146CJEU, 25 October 2011 in joined cases: C-509/09 and C-161/2010, eDate, op. cit., parr. 48-50.

2012).

The Advocate General Cruz Villalón in his conclusions in the eDate case followed the position of the Advocate General Bobek of the Mittelbayerischer Verlag case. Both of the Advocate Generals were based on the adoption by the CJEU of the relevant centre of gravity criterion for the conflict. The CJEU affirmed, in this regard, the:

"(...) "centre of gravity of the conflict", according to which the attribution of jurisdiction to the court of the place of the centre of the victim's interests should have been subordinated to the ascertainment of the actual interest aroused by the defamatory publication in the public of that place (...) excluding any consideration regarding the objective content of the publication for the determination of the competent court (...) in favour of the solution it opted for (...) it has correctly focused the criterion in question on the person of the victim rather than on the damaging content, since what really matters in the cases in question is the identification of the court closest to the holder of the violated personality rights (...) the centre of the victim's interests is (...) more appropriate to assess the extent of the damage caused to the injured party and to his position in the social environment to which he belongs (...) is particularly appreciable as it identifies a court undeniably close to the dispute, easily foreseeable by both parties, capable of ensuring the concentration of the dispute in a single judgment and even having a deterrent effect on the parties. For the publishers (who are discouraged from publishing defamatory content online) (...) the court has not precisely established the elements for locating the centre of interests of the victim in the eDate judgment (...) this place does not necessarily coincide with the habitual residence of the victim, and could well be located elsewhere (...) it has only generically specified in which cases the coincidence does not occur (...) it has attributed relevance to the work activity carried out by the victim (...) it is not very adequate due to the high level of discretion left to the judge of merit (...) in some cases it does not allow the jurisdiction of a single court to be established (...) the victim carries out his work activity (or a plurality of work activities) in different places, or in the case in which he lives with his family in one place but works exclusively in another (...) the victim has more than one centre of interests (...) the jurisdictional authorities of each of them may be said to have jurisdiction (...)".[147]

147See Art. 3 of the Regulation 2203/2003, op. cit., CJEU, 25 November 2021, C-289/20, IB v. FA, ECLI:EU:C:2021:955). See the conclusions of the Advocate

In the Ilsjan case, the reference to legal persons leads the CJEU to state that:

"(...) the aforementioned centre must be identified in the place where the company's registered office is located or in the different place where the latter carries out the essential part of its economic activity and, therefore, where its commercial reputation is more solid[148] (...) centre of the victim's interests. In a passage of the eDate judgment (...) identifying this moment in the moment of the publication online of the damaging information (...) such a solution is inadequate in view of the difficulty of ascertaining the actual date and time of online publication of a content (...) are susceptible to easy tampering by the author of the publication (...)".

In the Mittelbayerischer Verlag case it was stated that:

"(...) with respect to such cases the question was raised as to whether each of the innumerable victims of similar content could bring a lawsuit at the centre of their own interests, with the consequent multiplication of competent courts and serious prejudice to the author of the publication (...) such a solution was excluded (...) objective and verifiable information, contained in the online publication of a damaging nature, can avail itself of the court of the centre of their own interests to bring an action to protect their rights (...)".[149]

General Campos Sánchez-Bordona presented on 8 July 2021, in case C- 289/20, IB v. FA, ECLI:EU:C:2021:561, parr. 71-100: "(...) the need to interpret the aforementioned concept in such a way as to identify a single place, even in the case in which the interested party resides in more than one place at the same time (...) is imposed not only by the literal meaning of the provision, which speaks of "the Member State: a) in whose territory is found: - the habitual residence" using, therefore, the singular, but also by the need to avoid the multiplication of competent courts and to guarantee legal certainty (...)".

148CJEU, 17 October 2017, C-194/16, Ilsjan, op. cit., par. 41. Conclusions of the Advocate General in case: Gtflix Tv cit., parr 73-74: "(...) the court did not specify whether the place where the predominant activity of a company is carried out coincides with the place where that company makes the majority of its sales or with the place where its financial, human and technical resources are concentrated (...) in both cases it would be difficult for the defendant to obtain the information necessary to identify those places, since that information (the data on sales and company resources) falls within commercial confidentiality (...)".

149CJEU, 17 June 2021, C-800/19, Mittelbayerischer Verlag KG v. SM, op. cit.,, parr. 37-45.

Defamation and criterion of the place of establishment with the subject who caused the related harmful action

The eDate case highlighted the jurisdiction of the judges of the Member State in the place which established the "subject who issued the contents".[150] A first application finds space in Art. 7, n. 2 of the Brussels I-bis regulation attributing jurisdiction to the judge of the place of an illicit conduct as well as the judge that is based the damage. The title of jurisdiction seems superfluous and overlaps with the domicile of the defendant.

In the case of defamation via web it is highlighted that it coincides with the place of the harmful conduct in the place of establishment of the subject, who issued the harmful contents. This figure of provider refers to the court in a generic way and the so-called content provider, i.e. the subject who materially uploaded the content on the internet, is the service provider. This includes some figures such as the mere conduit provider, the caching provider and the hosting provider.

A three-element position that in the new regulation has to do with digital services. The provisions of Directive 2000/31/EC modify and provide for these three forms of subjects as well as the liability for the illicit nature of material uploaded to the

150CJEU, 25 October 2011 in joined cases: C-509/09 and C-161/2010, eDate, op. cit., par. 52: "(...) with respect to defamation in the press, it had identified the place of the event giving rise to the damage as the establishment of the publisher of the defamatory publication (...) it has adapted the aforementioned criterion, replacing the expression "publisher" with that of "subject who issued the defamatory content" (...)".

network.[151]

Except for exceptional cases that generate one's own liability,[152] the illicit nature is known for the information that is being published and that does not remove the information after knowing its illicit nature.[153]

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151 See Artt. 4, 5 and 6 of the regulation which refer to activities related to transport, temporary storage between the figures of the provider. The mere conduit of the provider consists in providing access to its own communication network that allows the simple transport of a network, as well as the information that is made available to third parties with the aim of making other recipients effective. As a hosting provider consists in its own storage that has a lasting character for its own information.

152 See Art. 4 of the regulation. The provider who has tried to limit the transport of data, i.e. the mere conduit provider who is exempt from liability that conditions the transmission for the information is not entitled to select the recipient for the transmission and modifies the information transmitted. Art. 5 provides for the exemption from liability of the provider who deals with the temporary storage of information, i.e. the caching provider and the related conditions without modification of the information. It thus complies with the conditions of access to information and the rules of updating between companies in the sector that does not interfere with the lawful use of technology that is widely recognized for use in the sector that obtains data to a use for the information that removes the information to knowledge of the same that are removed and disabled in the place where they are from the beginning and the judicial body and the administrative authority is disposed for the removal and disabling of their access.

153 See Art. 6 of the regulation which includes provisions replaced by art. 12, 13, and 14 of the e-commerce directive without bringing any other substantial changes in this regard. The regulation establishes the directive for the general prohibition imposing on service providers a general obligation to monitor the information they store, transmit, an obligation to actively search for and the circumstances surrounding the unlawfulness of the activities carried out. The novelties of the regulation affect the liability regime of providers consisting in the introduction of a harmonized discipline by providers for orders aimed at countering their own contents that are illegal, as well as information orders that are placed on the competent judicial and administrative authorities for the provision of due diligence obligations for a safe and transparent online environment. According to art. 16 the obligation of the hosting provider to provide mechanisms that allow users to report content of an illegal nature and the hosting provider and the related mechanisms consider as relevant targets that acquire actual knowledge of the unlawfulness for the information by intervening in the liability of the information and provided that the reports are such that they allow the hosting provider to be diligent and identify the unlawfulness without a detailed legal

The online publication of defamatory content occurs by the content provider, who uploads the relevant material. The service provider transmits and stores the material and is only liable under certain specific conditions.

The jurisdiction of the place where the subject who issued the defamatory content is established is understood in the sense that it attributes jurisdiction to the judge in the place where the content provider is established. Thus, it is attributed that the various places establish the service provider and have collaborated in the transmission and storage of the damaging material as well as to the subjects, who are not necessarily called to answer for the related illicit act.

Causes and implications of libel tourism

We speak of libel tourism when we refer to forum shopping. In this case, the victim of defamation files a compensation and/or inhibitory action before the judges of the state with the greatest probability of having a more favorable final result (Levi, 2012). This is perhaps an instrumentalization of the process for the victim of defamation, who escapes from favorable legal systems, that choose and root the judgment in a forum unfavorable to the defendant with the sole final objective of worsening the position of the latter. This leads to the conduct of

examination.

the judgment before jurisdictional authorities that are close to the dispute.

Forum shopping puts at risk the relative objectives pursued by the rules contained in the Brussels I-bis regulation, i.e. the predictability of the competent forum, as well as the good administration of justice.[154] In this way, the factors that constitute the cause of a phenomenon under examination are identified and, as a consequence, various distinct approaches are effectively contrasted.

The libel tourism is part of the inadequacy and interpretation of the provision relating to the forum of the tort, which works through the CJEU, the ubiquitous principle and the criterion of dissemination and accessibility of the defamatory content that multiplies the competent forums. The victim has the possibility of choosing the judge to appeal.

The mosaic approach follows the CJEU with reference to the actions of a compensatory nature for the victim of defamation to intend to a lawsuit for the various judges of limited jurisdiction on the basis of the criterion of multiplication for the pending judgments, which aggravate the position of the defendant.

The limitation for the jurisdiction of the judges in the place of

154See recital no. 9 of Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, in OJEU L 343 of 29.12.2010, which is affirmed that: "(...) in the sources of European Union law the reference to forum shopping (…) prevents situations in which one spouse applies for divorce before the other in order to ensure that the proceedings are governed by a law which he or she considers more favourable to the protection of his or her interests (…)".

dissemination, accessibility for publication respects the damages, which materialize in their own national territory, which makes it convenient for the plaintiff to position an action at a forum that has jurisdiction over damages suffered, such as the forum shopping. This is how the mosaic approach is stated. It is an exclusive cause of the libel tourism that supports the relative phenomenon under investigation.

The subjects are endowed with economic resources concentrating the action before a judge who is of full competence and who can establish various actions before judges of limited competence to thus create difficulties for the opposing party.

This phenomenon is based and identified despite the relative lack of a law applicable to extra-contractual obligations arising from the violation of personality rights. The plaintiff has the possibility of choosing the judge, who applies the conflict rule with the most favorable outcome for him.

The libel tourism passes through the adoption of the CJEU to interpretative criteria that have at their disposal the forum of the tort. It reduces the competent forums for defamation actions through the introduction of regulation Rome II and the rule on the law applicable to obligations, which arise from the violation of personality rights.

Libel tourism follows the attention of legal systems that foreign

actors intend to institute a defamation lawsuit. Libel tourism highlights some elements such as: the rule that leads the assertion of jurisdiction for national courts that respects the causes that have few elements of contact with the forum. In addition, a substantive legislation is favorable for the victim of defamation. In such a case, the conflict rule is based on the connecting criterion of the lex fori.

The United Kingdom is not a country that is part of libel tourism, i.e. that benefits the plaintiffs who complain of damage to their reputation. The British courts try to liquidate the title of compensation in favor of the victims with sums of money that respect international standards (Levi, 2012; Jones, 2019).[155]

Double actionability in the British common law system leads to the application of the lex fori. It analyses the entry into force of the Defamation Act 2013 and the subsequent one. In particular, section IV, part 6, rule 3(1)(9), of the "English Civil Procedure Rules and Practice Direction 6B" for the courts of the United Kingdom is an affirmation for the jurisdiction over cases in tort

155The losing defendant makes it difficult to be sentenced for the costs of litigation. Already in the United Kingdom system the rule of the defeat also refers to the legal costs that are borne by the victorious party. The costs are substantial and British lawyers are entitled to agree on the clause of the "no win, no fee" in connection with the success fee which provides that the payment of the fee for the lawyer only in the victory is a high amount. In ECtHR in contrast with Art. 10 ECHR the practice of the courts of the United Kingdom in defamation cases charge the losing party with the "success fees" agreed by the victorious party through his own lawyer. It was also the British Parliament that complied with this ruling only in November 2018 that defamation cases were placed under section 44 of the Legal Aid, Punishment and Sentencing of Offenders Act 2012 (LASPO). In cases brought after 6 April 2019 the winning party cannot obtain reimbursement for costs.

provided that the damage as a harmful act occurs in its national territory. This is a rule that establishes the jurisdiction of domestic courts whenever the material has been published in the United Kingdom.

British judges have applied the principle of the forum non conveniens as a basic rule. The judge declines jurisdiction whenever the forum is appropriate to decide the case and so considers publications that originate from the state.

Before the Defamation Act 2013 it was like a multiple publication rule since the publication as a copy of a newspaper contained a defamatory article considered it as an independent offence in conjunction with the filing of the action within the term of one year.[156]

British courts considered and decided defamation cases relating to the publication of even a few copies within the territory of the United Kingdom for damages caused to the victim as a practice relating to the so-called limited damages requirement rule.[157]

In the Berezovsky v. Michaels case the House of Lords considered the English courts to be competent in the case of a Russian businessman, who complained of damage to his reputation due to an article accusing him of corruption published in the American magazine Forbes and sold in the United

156Section 4A of Limitation Act 1980.

157Jameel (Yousuf) v. Dow Jones & Co. Inc. ([2005] QB 946) of 3 February 2005 in which the Queen's Bench Division did not accept the appeal which had as its subject matter compensation for damages caused by the publication of a defamatory article on the website and which was accessed by five users of the United Kingdom.

Kingdom. There were only 1900 copies compared to over 780 thousand distributed in the United States.[158]

The English judges ruled for the damage suffered by the plaintiff of the United Kingdom due to the fact that he enjoyed the reputation in this state where his ex-wife and children lived (Auda, 2016).[159]

In Bin Mahfouz v. Ehrenfeld, the Queen's Bench Division had jurisdiction to hear the appeal. A Saudi businessman claimed damages after the publication in the United States of a book which he accused of financing terrorist organisations,[160] arguing that:

"(...) its jurisdiction because English users, through a website, had been able to read the first chapter of that book and purchase copies (...)" (Hartley, 2010).[161]

In the Al Amoudi v. Kifle case the English judges stated that:

"(...) its jurisdiction over an action for damages for defamation (...) of Ethiopian origin, against the publisher of a US online magazine (the

158House of Lords, 11 May 2000, Berezovsky v. Forbes Inc. & Michaels, [2000] EMLR 643: https://www.5rb.com/case/berezovsky-another-v-forbes-inc-another/ Accessed on 10.09.2025.

159The judges of the House of Lords expressed their opinion in a dissenting opinion: Lord Hoffman: "(...) the dispute had insufficient connections with the forum, since, on the one hand, the copies of the magazine in question had been sold predominantly in the USA (...) the reputation that Berezovsky enjoyed in England was only a small segment of the reputation he enjoyed globally (...)".

160England and Wales High Court-Queen's Bench Division, 3 May 2005, Bin Mahfouz v. Ehrenfeld, [2005] EWHC 1156 (QB): https://www.5rb.com/case/mahfouz-ors-v-ehrenfeld-anor/ Accessed on 10.09.2025.

161The Queen's Bench Division ordered the defendant to pay a sum in excess of £124,000 as compensation for the damage suffered by its plaintiff in England and as reimbursement for the costs of the litigation that have been incurred. The court prohibited the author from publishing a book in English, thus forcing the withdrawal from the market of all copies that avoid being purchased via Internet in its own British territory.

Ethiopian Review)[162] (...) the Queen's Bench Division, in particular (...) has jurisdiction to rule on the damage caused by the said article to the reputation enjoyed by the plaintiff in the Ethiopian community in the United Kingdom, since the website containing the defamatory publication (...)".

The cases just mentioned are indicative of the public opinion, that has pushed the legal systems of the states involved to adopt various reforms. Already in 2010 the United States Congress approved the Securing the Protection of our Enduring and Established Constitutional Heritage Act (c.d. "SPEECH Act") which introduced and enforced foreign judgments relating to defamation cases that are in conflict with the protection of the First Amendment of the Constitution for the United States concerning freedom of expression.

The British government adopted the Defamation Act in 2013 bringing changes to rules relating to jurisdiction as well as those of substantive law.[163]

National courts decline jurisdiction over defamation cases that the defendant is not domiciled in the United Kingdom and that the places of the defamatory publication distributed in Wales and England are not places brought for this type of cause.[164]

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162 England and Wales High Court-Queen's Bench Division, 29 July 2011, Al Amoudi v. Kifle, [2011] EWHC 2037 (QB): https://www.casemine.com/judgement/uk/5a8ff7ba60d03e7f57eb1969 Accessed on 10.09.2025.

163 Defamation Act 2013, approved on 25 April 2013.

164 Section 9, Defamation Act 2013. for the individual not domiciled in the United Kingdom and not domiciled in a member state of the European Union and/or a state that is party to the Lugano Convention. After Brexit, the equivalence does not consider as valid the judges of the United Kingdom that are not binding on the application of the relevant jurisdiction rules according to the Brussels I-bis regulation that respects the defendants domiciled for the member states of the Union.

The so-called limited damages requirement rule allows the British courts to exercise their jurisdiction as a cause of defamation and as a result of a global assessment of the facts that results in the forum to decide the related dispute.

Section 8 of the Defamation Act of 2013 has highlighted the so-called single publication rule that has required the judges of the United Kingdom to attribute the first publication to the defamatory material without considering the subsequent publications as object[165].

The Defamation Act of 2013 has dealt with the discretion of rules. Section 9 establishes the appropriate forum to decide the judge the cause as well as to consider the risk for the purpose of exceeding the limited damages requirement rule.[166]

Section 8 allows the British judges the relative application of multiple publication rule as a result of a discretionary assessment, considering that the publications are different from the latter. The Defamation Act of 2013 has thus affirmed “a step

165Section 8 (3), (4), Defamation Act 2013. The single publication rule was introduced at a time running from the annual period for bringing an action in defamation matters and as provided for by section 4A of Limitation Act 1980. The explanatory notes to this rule are introduced to avoid that a year earlier the publication of a particular content by the author could be subject to other causes of action following the publication of the same content again.

166See, section 9 of the Defamation Act which provides guidance for UK courts in assessing which limits their discretion. The judge thus assesses for Wales and England the appropriate jurisdictions to hear a defamation case which takes into account the number of publications which are distributed in states compared to those which are distributed in other countries. As regards damages the plaintiff has suffered for other states those suffered to the extent that the publication is addressed to the public of those states. The plaintiff in another jurisdiction risks suffering an understanding for guarantees of due process.

in the right direction" which goes in contrast with the libel tourism in the United Kingdom and thus is insufficient and not accompanied by a correct application by the judges in England and Wales.[167]

Libel tourism is a phenomenon that is connected with a plurality of factors namely jurisdictional titles, conflict rules and substantive legislation, making thus the systems more flexible for those who intend to sue for defamation. It is not enough to rethink jurisdiction titles that are elaborated for the CJEU and also introduces a conflict rule in the field of defamation.

The interventions are effective for national legislators as acts that hinder the libel tourism, that proceeds towards an orientation of harmonization and integration of substantive regulations for the Member States in the field of defamation with a way to reduce divergences that are present between them.

Concluding remarks

A relative balance of rights gives rise to outcomes that are different from each other between models that are opposed. The

167 In section 1, the relevant provision was introduced which declared as non-defamatory the publication which has not caused serious damage to the reputation of the actor. This is a provision which is interpreted by the Supreme Court of the United Kingdom in the Lachaux v. Independent Print Ltd and another case (Supreme Court UK, 12 June 2019, Lachaux v Independent Print Ltd and another [2019] UKSC 27) working with an overcoming of the relative presumption of damage in favour of the victim imposing thus on the judge a serious harm that the victim complains, which does not limit to evaluate the defamatory statement which takes into consideration the reality of the facts. The aspects of the substantive legislation for defamation and the Defamation Act 2013 leaves unchanged the presumption of a falsity for the declaration of an objective nature for the author responsible.

English model and the international private law rules are applied to the period prior to the introduction of the Defamation Act of 2013. It is a balance between the right to honor and privacy and the right to freedom of expression, that as a clear prevalence respects a tendency for British judges to accept a jurisdiction in cases that have connections with the forum.

The presence of a conflict rule, the so-called double actionability rule, is connected with the application of the lex fori for the victims of defamation by the authors of the damaging publications.

The American model on the contrary gives prevalence to freedom of expression, honor and privacy within the scope of international private law, protecting more the author of a defamatory publication (Little, 2012-2013).[168]

The single publication rule consider each publication of the material as a single publication that originates from a single illicit act as a single judgment that avoids the multiplication of the competent forums.[169]

168Freedom of expression on the right to privacy is noted in the US legal system through the First Amendment of the United States Constitution which establishes the prohibition on Congress from enacting laws that have the purpose of limiting the freedom of speech or of the press. The protection of this constitutional provision has been strengthened by the relative introduction of the SPEECH Act of 2010 which prevents the recognition of foreign judgments that are in conflict with the First Amendment. See also: Communication Decency Act at §230(c) which provides exemption from liability for each provider and the user in relation to the material that another content provider uploads, that is, the related offenses that are caused by the publication of the material online that responds to the subject who uploaded it and in no case are providers liable that store or transmit the related material on their servers.

169See: Wolfson v. Syracuse Newspaper Inc. (New York Appellate Division, 19 October 1938, Wolfson v. Syracuse Newspaper Inc., 4 N.YS.2d

Starting from the 1984 ruling of the Supreme Court of the United States in the Calder v. Jones case,[170] the US courts have held that the members know the defamation action brought against a foreigner before the judgment, which reasonably foresees for the defendant of the state of the forum to have the intention addressed to a publication towards the targeting test.[171]

The solutions for the conflicts of laws and the jurisdictions applicable to the Union and to the cases of transnational defamation are closer to the English model. The balance between the right and liberty and the right to honor that ends up giving prevalence to the second.

The jurisdiction titles developed by the Court of Justice in the Shevill and eDate judgments have favored the victim of defamation giving him the possibility of choice of the forum for the case of torts via internet and at the center of his interests.

640:https://casetext.com/case/wolfson-v-syracuse-newspapers-inc-2 (Accessed on 10.09.2025); Firth v. State of New York of 2000 (New York Court of Claims, 8 March 2000, George Firth v. State of New York, 706 N.Y.S.2d 835: https://casetext.com/case/firth-v-state-of-ny Accessed on 10.09.2025.

170 Supreme Court of the United States, 20 March 1984, Calder v. Jones, 465 U.S. 783: https://supreme.justia.com/cases/federal/us/465/783/ Accessed on 10.09.2025.

171 See for example: U.S. Court of Appeals for the 5th Circuit, 31 December 2002, Revell v. Lidov, 317 F.3d 468: https://law.justia.com/cases/federal/appellate-courts/F3/317/467/484358/ (Accessed on 10.09.2025); U.S. Court of Appeal for the 4th circuit, 13 December 2002, Young v. New Haven Advocate, 315 F.3d 256:https://casetext.com/case/young-v-new-haven-advocate (Accessed on 10.09.2025); U.S. District Court for the District of Massachusetts, 27 August 2010, Broadvoice Inc. v. TP Innovations LLC, 733 F. Supp.2d 219: https://casetext.com/case/broadvoice Accessed on 10.09.2025.

The lack of predictability of the law of conflict in matters of violations for the rights of personality through regulation Rome II and the application of national systems at international private level for the authors of the publications, are noted. Freedom of expression is strong for the authors and publishers, who are oriented towards a self-censorship, i.e. chilling effect as risk of a plurality of judgments of jurisdictional authorities and legal systems that are not known (Reymond, 2011).[172]The right to honor and the right to freedom of expression thus receive the protection of major supranational sources on fundamental rights for man.

Art. 8 and 10 ECHR and art. 7 and 11 CFREU (Liakopoulos, 2019c) are the foundations to include human rights in order to establish and develop relationships with other human beings with the outside world and the development of one's social identity.[173] This is an extensive interpretation that protects the burden and preservation of reputation. The ECtHR has highlighted the freedom of expression and the right to respect private life that deserve equally the national authorities of the

172B. Hess, T. Pfeiffer, P. Schlosser, Report on the Application of Regulation Brussels I in the Member States, study JLS/C4/2005/03, final version September 2007, par. 214: https://www.yumpu.com/en/document/view/23494294/general-report-study-jls-c4-2005-03-european-commission Accessed on 10.09.2025.

173ECtHR, 22 May 2009, Bigaeva v. Greece, n. 26713/05, par. 22; 25 September 2018, Denisov v. Ucraine, n. 76639/11, par. 95; 7 May 2002, Khadija Ismayilova v. Azerbaijan, n. 35283/14, par. 36.

contracting states and in specific cases to preserve the essence of both.[174]

These are aspects that take into account the formulation of rules applicable in cases of transnational defamation (Liakopoulos, 2019d). From the neutrality of private international law and the form of connecting factors and jurisdictional titles are considered for protection the fundamental rights (Gonzáles Campos, 2002; D'Avout, 2010; Weller, Schulz, 2019).

For both the ECtHR and the CJEU[175] the private international law of the Union seeks to fulfill its function for human rights. The conflict rules that are designed to guarantee and promote fundamental rights are oriented to regulate them (Liakopoulos, 2019e). These are rights of equal standing that deserve equally

174ECtHR, 27 June 2017, Satakunnan Markkinapörssi Oy e Satamedia Oy v. Finland, n. 931/13, par. 123; 16 June 2015, Delfi As v. Estonia, n. 64569/09, par. 110: "(...) the balancing of the rights at stake is left to the discretion of the national authorities and such discretion is limited only by compliance with certain criteria developed by the Court itself (ECtHR, Satakunnan judgment cited above, paragraphs 163, 164). In particular, in order to establish whether or not a given publication infringes the right protected by Art. 8 ECHR, the national authorities must assess whether the publication represents a contribution to a debate of general interest and refers to a well-known figure; they must also take into account the previous conduct of the interested party, the content (...)". 7 February 2012, Axel Springer AG v. Germany, n. 39954/08, parr. 90-95; 7 February 2012, Von Hannover v. Germany (no. 2), nn. 40660/08 e 60641/08, parr. 109-113. CJEU, 14 February 2019, C-345/17, Buivids, ECLI:EU:C:2019:122, par. 65

175ECtHR, 3 May 2011, Negrepontis-Giannins v. Greece, n. 56759/08. 28 June 2007, Wagner v. Luxemburg, n. 76240/01): "(...) a violation of the right to private and family life protected by art. 8 ECHR in the refusal by the Contracting States to recognise statuses acquired abroad (...) the principle according to which the application of the rules of private international law on the recognition of foreign acts and judgments cannot lead to outcomes contrary to fundamental human rights (...)". CJEU, 1st July 2010, C-211/10PPU, Doris Povse v. Mauro Alpago, ECLI:EU:C:2010:400, I-06673.

to protect solutions for conflicts of laws and jurisdictions.[176]

176Institut de Droit International, Draft Resolution Explanatory Report, 27 January 2021, 4ème Commission Droits de l'homme et droit international privé. Human Rights and Private International Law. Art. 2 of the draft resolution that provides for states and legislative bodies as well as administrative and judicial authorities as well as international courts and tribunals including arbitrators that respect and protect human rights in transnational relations between private individuals. Para. 2 of the same article highlights that human rights respect and protect in the phases of preparation, application, interpretation of rules of private international law that are part of and that affect these rights.

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